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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

LEARLEY REED GOODWIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the prosecutor's decision to increase charges against respondent may properly be characterized as "vindictive" prosecutorial action in violation of the Due Process Clause merely because it occurred after respondent elected to be tried by jury.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is reported at 637 F.2d 250. The order of the court of appeals denying rehearing (App. C, *infra*, 17a) is not reported. The opinion of the district court (App. D, *infra*, 18a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 16a) was entered on January 9, 1981. A petition for rehearing was denied on April 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] The petition is 11 days out of time under Rule 20.1 of the Rules of this Court. Due to a clerical error in the docketing of the case in the Department of Justice, the date of the court of appeals' denial of rehearing was mistakenly recorded as April 29, 1981, rather than April 16, 1981. Accordingly, the

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, respondent was convicted of forcibly assaulting a federal officer, in violation of 18 U.S.C. 111, and of fleeing from a police officer, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. § 21-904 (1977). He was sentenced to consecutive terms of five years' imprisonment on the assault count and one year's imprisonment on the flight count. On appeal, a panel of the Fourth Circuit reversed respondent's felonious assault conviction, finding that the charge had impermissibly been brought after respondent invoked his right to be tried by jury on certain misdemeanor and petty offense charges that previously were filed against him.

1. On the evening of February 2, 1976, the vehicle that respondent was driving was stopped for speeding by U.S. Park Policeman James Morrissette

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government planned to file the instant petition on June 26, 1981, within the 60 day period specified in the Court's rules. The clerical error was not discovered until June 24, at which time it was too late to move for an extension of time to file the petition under Rules 20.1 and 29.2. We note that the instant petition is being filed well within the maximum 90-day period allowed under Rule 20.1 for criminal cases in which an extension is granted. The time limit prescribed in Rule 20.1 is not jurisdictional. See R. Stern & E. Gressman, *Supreme Court Practice* 389-393 (5th ed. 1978) (collecting decisions of this Court). The delay in filing the instant petition can cause no prejudice to respondent, and, due to the Court's summer recess schedule, will not result in delay in acting on the petition or, should certiorari be granted, in deciding the case. We also note that this is the only case since *United States* v. *Mazurie*, 415 U.S. 947 (1974), 419 U.S. 544 (1975), in which the government has asked the Court to consider an untimely petition in a criminal case. In view of the important constitutional issue presented in this case, we respectfully urge the Court to waive the time limit in Rule 20.1 and to consider the petition on the merits.

on the Baltimore-Washington Parkway (C.A. App. 91-108).[2] Both respondent and Officer Morrissette got out of their automobiles and walked to the passenger side of respondent's car. After checking respondent's driver's license, Officer Morrissette shined his flashlight into the car and asked respondent to lift the armrest on the front seat of the car. Respondent entered the car, placed it into gear, and rapidly accelerated. As the car started forward, it "fish-tailed," striking Officer Morrissette and knocking him onto the back of the car and then into the highway (*id.* at 100-101). When the officer recovered himself, he returned to his car and, with lights flashing and siren sounding, pursued respondent at speeds reaching 95 miles per hour. Respondent nonetheless eluded the officer in heavy traffic (*id.* at 101-103). The following day, Officer Morrissette filed a complaint in the United States District Court for the District of Maryland at Hyattsville, charging respondent with several misdemeanor and petty offense counts, including the misdemeanor count of "assault by striking" a police officer, in violation of 18 U.S.C. 113(d) (App. A, *infra*, 2a; C.A. App. 53).[3]

Respondent thereafter was arrested on March 11, 1976, and was arraigned before the United States Magistrate in Hyattsville. After a preliminary hearing, the case was set for trial on April 29, 1976. Be-

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[2] "C.A. App." refers to the joint appendix in the court of appeals.

[3] The other charges contained in the complaint were as follows: two counts of speeding, in violation of 36 C.F.R. 50.31; one count of reckless driving, in violation of 36 C.F.R. 50.32; one count of failing to give aid at the scene of an accident, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. §§ 20-102 and 20-104 (1977); and one count of fleeing from a police officer, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. § 21-904 (1977) (C.A. App. 53).

fore that time, however, respondent fled the jurisdiction. He also failed to appear for trial (App. A, *infra*, 2a-3a). Respondent remained absent from the jurisdiction for over three years, after which Virginia state correctional authorities returned him to Maryland (C.A. App. 66-67).

2. Upon his return to Maryland, respondent's case was assigned to Ms. Blanche Bruce, an attorney from the Antitrust Division of the Department of Justice who temporarily was detailed in Hyattsville to try petty crime and misdemeanor cases before the magistrate. Ms. Bruce performed that duty for a two-week period, during which she was authorized to try complaints filed by law enforcement officers (C.A. App. 110-112). She did not have authority to try felony cases, to seek indictments from the grand jury, or to file informations.

On May 24, 1979, Ms. Bruce was "approached" by respondent's attorney, who "asked if the Government would consider a plea" (C.A. App. 111). Ms. Bruce expressed interest in the proposal, but respondent later advised counsel that he did not wish to plead guilty and desired a trial by jury before the district court. It is stipulated that, at this point, "none of the parties in any way considered the fact that a[] [felony] indictment might or could be brought" against respondent (*ibid.*).

After respondent pleaded not guilty and requested a jury trial, the case was transferred to the district court in Baltimore and was assigned to Assistant United States Attorney Edward Norton. As part of his pretrial preparation, Norton carefully reviewed the file and interviewed Officer Morrissette. He also conducted an independent investigation into respondent's background. His research disclosed that respondent appeared to be involved on a continuing basis in serious violent misconduct and drug-related

crimes. In view of those facts, Norton obtained a four count indictment on July 3, 1979, charging respondent with one felony count of forcibly assaulting a federal officer, in violation of 18 U.S.C. 111, and three related counts arising out of the same incident (App. E, *infra*, 30a-31a; C.A. App. 1, 7-14). As previously noted, respondent was convicted after a jury trial on one felony count of forcibly assaulting Officer Morrissette and on one misdemeanor count of fleeing to evade arrest.

3. Following the jury's verdict, respondent moved to dismiss the felonious assault count of the indictment, contending that the charge gave rise to an impermissible "appearance of retaliation" (C.A. App. 59).[4] Although respondent did not "assert actual vindictiveness on the part of the Government" (*id.* at 56), he claimed that Prosecutor Norton's decision to increase charges after he invoked his right to trial before the magistrate generated an "apprehension of retaliation" (*id.* at 57, 60). In response to that motion, Prosecutor Norton filed an affidavit (App. E, *infra*, 25a-32a) explaining his decision to seek a felony charge. The affidavit stated that Norton's investigation of respondent disclosed that, after the initial charges were lodged by Officer Morrissette, respondent had fled to California, where he had been imprisoned for violating the laws of that State (*id.* at 26a). Norton also learned that respondent recently had been tried and convicted in Virginia for attempting to shoot a police officer and for possession of over 500 $20 bags of heroin (*id.* at 29a). Officer Morrissette advised Norton that respondent had committed perjury at his preliminary hearing in Hyattsville, prior

[4] Despite the fact that respondent's dismissal motion was untimely under Fed. R. Crim. P. 12(b), (f), the district court found good "cause" for the delay (App. D, *infra*, 19a-20a) and considered the motion on the merits.

to his flight from the jurisdiction (*id.* at 27a-28a). Morrissette also informed Norton that respondent was known to the federal Drug Enforcement Administration and the Washington, D.C. police as a major heroin dealer (*id.* at 28a) and was associated with two persons who smuggled heroin from Mexico and distributed it in Florida, Georgia, and Maryland (*ibid.*).

The prosecutor then summarized the facts that caused him to obtain a felony indictment as follows (App. E, *infra*, 30a-31a):

> First, I considered Mr. Goodwin's conduct on February 2, 1976 to be a serious violation of law. He had intentionally resisted a United States Park police officer in the performance of his duties, striking the officer with an automobile, leaving him perhaps seriously injured on the highway, and fleeing through traffic at a high rate of speed, thus endangering the lives of other drivers.
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> Second, among the documents I received in the Court file from Magistrate Burgess was a copy of Goodwin's FBI record. That record showed Mr. Goodwin's lengthy history of violent crime.
>
> Third, based on my conversations with Officer Morrissette and Assistant [Virginia] Commonwealth[] Attorney Jones, I judged Goodwin's conduct on February 2, 1976 to be related to major narcotics transactions.
>
> Fourth, I believed Mr. Goodwin had committed perjury in his testimony under oath at the preliminary hearing before Magistrate Burgess on March 30, 1976.
>
> Fifth, subsequent to the filing [of] the initial complaint on February 3, 1976, Mr. Goodwin had failed to appear for a trial scheduled for April 29, 1976.
>
> In summary, my decision to seek an indictment charging Mr. Goodwin with two felonies,

> 18 U.S.C. 111 and 18 U.S.C. 113[(c)], was based upon the totality of the circumstances set forth above and upon my judgment that his conduct on February 2, 1976 involved not merely a traffic incident on the Baltimore-Washington Parkway but also serious violations of federal law committed by a dangerous individual. My decision to seek a grand jury indictment was not motivated in any way by, nor did I ever consider Goodwin's request for a trial by jury in the United States District Court.

4. At respondent's request (C.A. App. 79, 109-112), the district court held a hearing on the issue of vindictive prosecution.[5] Following that hearing, the district court found (App. D, *infra*, 22a) that "the prosecutor in this case has adequately dispelled any appearance of retaliatory intent." The court noted that the prosecutor "did not receive all the information relating to the charges against Mr. Goodwin until June 11, 1979" and "did not read the information and seek an indictment until some time thereafter." The court added that "the Assistant U.S. Attorney in this case did not know of the Defendant's prior record until after the Defendant requested a jury trial. Since the prosecutor was not aware of the additional information on which the indictment was based until after the May 24th proceedings before Magistrate Burgess [the proceedings in which respondent requested a trial by jury], it appears far less likely that he was motivated by any vindictiveness" (*id.* at 22a-23a). Finally, the district court rejected respondent's assertion that the indictment should be conclusively presumed to be vindictively motivated simply because it was theoretically

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[5] At the hearing, the district court considered stipulated facts, affidavits, briefs and oral argument addressed to the issue of prosecutorial vindictiveness.

possible for the prosecutor to obtain all of the relevant information about respondent's background before respondent exercised his right to trial (*id.* at 23a):

> The Defendant intimates that because the Government had *access* to all pertinent information prior to May 24, 1979, since a representative of the Antitrust Division of the Department of Justice was appointed for a two-week tour of duty before Magistrate Burgess in the prosecution of misdemeanors and petty offense type cases, that the impermissible appearance of vindictiveness remains. However, the case law does not imply, and the due process clause does not require, that the prosecutor carry such a heavy burden of acquiring all information which is potentially available to him at a given time.

5. A divided panel of the court of appeals reversed respondent's felony conviction (App. A, *infra*, 1a-15a). The court initially stated that, "[o]n this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment" (*id.* at 4a). Although finding no actual vindictiveness, the majority ruled that there was an appearance of vindictiveness since the filing of the felony charge followed respondent's decision to stand trial (*id.* at 5a-6a). The court of appeals stated that "the due process clause protects a defendant from both actual vindictiveness and the fear of retaliation for exercising" a procedural right (*id.* at 4a-5a). The court added that "the *fear* of prosecutorial vindictiveness, as well as *actual* vindictiveness," has a "chilling effect" on the exercise of procedural rights, and therefore is protected against under the Due Process Clause (*id.* at 5a; emphasis in original).

The court of appeals distinguished this Court's decision in *Bordenkircher* v. *Hayes*, 434 U.S. 357

(1978), which had held that a prosecutor may threaten a defendant with increased charges during plea negotiations and "up the ante" if the defendant insists on his right to stand trial. The court noted that, in this case, in contrast to *Bordenkircher*, respondent was not expressly threatened with increased charges if he elected to stand trial. The court reasoned that the absence of a threat indicated that a due process violation could be found to exist here while it was not found in *Bordenkircher* (App. A, *infra*, 6a-8a).

Finally, the court ruled that the prosecutor could not rebut the appearance of vindictiveness unless he presented evidence showing that "the increased charges could not have been brought before the defendant exercised his rights" (App. A, *infra*, 10a). The court stated that "[l]est exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges, * * * at least where there [was] no showing that the charges could not have been brought before defendant made his election for a jury trial" (*id.* at 6a). The court expressed disagreement with decisions of other circuits that allow a "more far-reaching inquiry" into the issue of prosecutorial vindictiveness (*id.* at 9a n.1).

Judge Widener dissented (App. A, *infra*, 14a-15a). He concluded that the prosecutor's filing of increased charges in the present case, after plea negotiations broke down, was a fortiori proper under this Court's decision in *Bordenkircher* (*ibid.*):

> As the majority correctly notes, *Bordenkircher* "held that a prosecutor does not violate due process by threatening to increase charges in the

course of plea bargaining and then following up on that threat after plea negotiations break down." * * * Applying *Bordenkircher* to our case, if the government had threatened to prosecute Goodwin for assaulting the officer during the plea negotiations which did take place, and then had indicted Goodwin for that crime when the plea negotiations broke down, such conduct would have been approved under *Bordenkircher*. But because of the lack of a threat by the prosecutor to indict, the majority sets aside the conviction because "the circumstances surrounding the felony indictment [the assault on the officer] give rise to a general risk of retaliation." * * * The court now holds that while an expressed threat of retaliation will not suffice to set aside a conviction because of *Bordenkircher*, merely a general risk of retaliation without the expressed threat will suffice. If we analyze what the prosecutor did in *Bordenkircher*, we see that in that case he deliberately threatened the defendant with indictment for an additional offense in order to discourage trial, and to encourage a guilty plea, and the prosecutor expressly so advised the defendant before trial. * * * In our case, there is no intimation that the prosecutor was acting with vindictiveness in seeking the indictment for assaulting the officer, and the majority so finds. * * * Neither did he make any attempt to discourage any exercise of Goodwin's right to trial by jury. Thus, what the majority now adopts is a *per se* rule, the effect of which is that a prosecuting attorney must see to it that formal charges are *initially* filed for the most serious offense of which a defendant may be guilty or else forever forfeit the right to so prosecute him if the defendant contests the prosecution in any way.

REASONS FOR GRANTING THE PETITION

1. This case presents important questions under the Due Process Clause concerning the circumstances under which a prosecutor may properly seek new and increased charges against a criminal defendant who previously has exercised some procedural right. The court of appeals has ruled that a prosecutor may not prefer increased charges against a defendant—no matter how well justified those charges are—unless the prosecutor establishes that the charges could not have been preferred prior to the defendant's exercise of a procedural right. That ruling is based on a serious misreading of this Court's decisions in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and conflicts with decisions of several other courts of appeals.

In *Blackledge* v. *Perry*, *supra*, this Court held that the Due Process Clause barred a prosecutor from obtaining increased charges against a defendant who pursued his statutory right to a trial de novo. The Court found a "realistic likelihood" of vindictiveness in the case before it, since the prosecutor had "a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo * * *." 417 U.S. at 27. Since *Perry* was decided, there has been a proliferation of cases in which claims of "prosecutorial vindictiveness" have been asserted. While *Perry* and its progenitor, *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), involved post-trial increases in charge or sentence, the lower courts often have accepted vindictive prosecution claims arising, like this one in the instant case, during the pretrial phase of criminal cases. At that stage of a criminal proceeding, prosecutors are engaged in trial preparation and are continuously receiving new information that may affect their view as to the proper charges to be pressed against the

defendant. Likewise, accused persons are continuously exercising various procedural rights under the Constitution, federal statutes, the Federal Rules of Criminal Procedure, and local district court rules. Defense counsel have had no difficulty in connecting a prosecutor's enhancement of the charges against the accused (or a prosecutor's taking of other action contrary to the interests of the accused) with the accused's exercise of a procedural right, and repeatedly have filed pretrial dismissal motions and have demanded hearings based on claims of "vindictive prosecution." [6] The difficulties created by pretrial

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[6] We collect below only a few recent examples of such claims, described in the reported opinions of the courts of appeals. See, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 646 F.2d 384 (9th Cir. 1980) (claim that a superseding indictment was a vindictive response to a motion to change venue); *United States* v. *Shaw*, No. 80-1329 (9th Cir. Mar. 2, 1981) (claim that the prosecutor's motion to set aside a guilty plea was a vindictive response to a defense motion for arrest of judgment); *United States* v. *Schiller*, No. 79-1206 (D.C. Ct. App. Oct. 21, 1980) (claim that increased charges were the result of a defense motion for consolidated trial); *United States* v. *Herrera*, 640 F.2d 958 (9th Cir. 1981) (claim that prosecutor's decision to try defendant on original charges after plea bargaining broke down was vindictive); *United States* v. *Burt*, 619 F.2d 831 (9th Cir. 1980) (claim that reindictment was a vindictive response to the defendant's suppression motion in a prior proceeding); *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir. 1980) (claim that second indictment was a vindictive response to motion to dismiss first indictment); *United States* v. *Rosales-Lopez*, 617 F.2d 1349 (9th Cir. 1980) (claim that superseding indictment was a vindictive response to demand for jury trial); *United States* v. *Shaw*, 615 F.2d 251 (5th Cir. 1980) (claim that a superseding information was a vindictive response to defense request to transfer case to a different magistrate); *United States* v. *Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc) (claim that superseding indictment was a vindictive response to a request for bail); *United States* v. *Gardner*, 611 F.2d 770

claims of vindictive prosecution have been greatly compounded by frequent defense efforts to obtain interlocutory review of such claims in the courts of appeals.[7]

In view of the frequency with which claims of prosecutorial vindictiveness are litigated in criminal

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(9th Cir. 1980) (claim that second indictment was a vindictive response to defense request for trial and exercise of "right" not to cooperate with the government); *United States* v. *Black*, 609 F.2d 1330 (9th Cir. 1979) (claim that new indictment was a vindictive response to defense motion to vacate guilty plea); *United States* v. *Thomas*, 593 F.2d 615 (5th Cir. 1979) (claim that additional charges were the result of defense motion seeking clarification of the indictment); *Chapman* v. *Estelle*, 593 F.2d 687 (5th Cir. 1979) (claim that prosecutor's refusal to engage in plea bargaining was a vindictive response to defendant's motion to set aside guilty plea); *United States* v. *Stacey*, 571 F.2d 440 (8th Cir. 1978) (claim that indictment was a vindictive response to defendant's effort to obtain return of confiscated evidence); *United States* v. *Groves*, 571 F.2d 450 (9th Cir. 1978) (claim that increased charges were a vindictive response to a dismissal motion under the Speedy Trial Act); *United States* v. *Sturgill*, 563 F.2d 307 (6th Cir. 1977) (claim that second information was a vindictive response to defendant's request to be tried by a judge rather than a magistrate); *Hardwick* v. *Doolittle*, 558 F.2d 292 (5th Cir. 1977) (claim that new charges were a vindictive response to defense efforts to remove case to federal court); *United States* v. *Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977) (claim that increase in charges was a vindictive response to "possible motions" by the defendant).

[7] The Ninth Circuit, which allows interlocutory review of vindictive prosecution claims, recently observed in *United States* v. *Wilson*, 639 F.2d 500, 502 n.1 (1981): "Delay, disruption of calendars, loss of jury time, and needless expense follow in the wake of these interlocutory appeals. [D]efense attorneys, as advocates, * * * [have] added 'vindictive prosecution' to their check list of possible strategy for delay, continuance, severance, or dismissal. The resulting outpouring of motions was predictable."

cases in the district courts, and in view of the harmful effect that an unduly expansive interpretation of the vindictive prosecution doctrine would have in the pretrial context, this Court should provide further guidance to the lower courts by granting the petition in this case. If allowed to stand, the decision of the Fourth Circuit will prevent prosecuting attorneys from fulfilling their public responsibility to prefer appropriate charges against criminal defendants after a procedural right has been exercised by the defense, and will impair the government's ability to rebut claims of prosecutorial vindictiveness in an ever increasing number of cases. The practical consequence of the rule embraced by the majority of the panel, as Judge Widener correctly noted (App. A, *infra*, 15a), is that "a prosecuting attorney must see to it that formal charges are *initially* filed for the most serious offense of which a defendant may be guilty or else forever forfeit the right to so prosecute him if the defendant contests the prosecution in any way." The Due Process Clause should not be interpreted to produce that undesirable result.

2. As Judge Widener observed in his dissenting opinion in the court below (App. A, *infra*, 14a-15a), the result reached by the majority in this case cannot reasonably be reconciled with *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). In *Bordenkircher*, this Court held that it was permissible for a prosecutor to threaten the accused with increased charges for the purpose of encouraging the accused to waive his right to trial, and thereafter to significantly enhance charges in response to the accused's decision to stand trial. There was no doubt in *Bordenkircher* that the prosecutor threatened the increase in charges to discourage the defendant from exercising a constitutional right, and that the prosecutor "upped

the ante" in direct response to the exercise of that right. See 434 U.S. at 361 & n.7.

In the present case, in contrast, the prosecutor made no attempt to threaten the accused or to dissuade him from exercising a constitutional right. Moreover, as both the district court and the court of appeals agreed, the prosecutor's addition of charges against the accused was not a vindictive response to the exercise of any right. See App. A, *infra*, 4a: "On this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment." Thus, even though no effort was made to discourage the exercise of any right and the addition of charges was not in retaliation for the invocation of such a right, the court of appeals found a violation of the Due Process Clause.

We submit that it is a fundamentally misguided conception of the Due Process Clause that would command dismissal of valid criminal charges in cases in which there is no discernible element of threat or retaliation. Indeed, it is no exaggeration to say that, following the decision of the court of appeals, a prosecutor is free to threaten increased charges and raise charges in direct response to a defendant's exercise of the right to stand trial, but may not increase charges in response to the receipt of new information unless he first threatens the accused and attempts to coerce a waiver of that constitutional right. This illogical result should not be countenanced. On the facts of this case, the Court's observation in *Bordenkircher* (434 U.S. at 364) should apply a fortiori:

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

3. The major premise of the court of appeals' finding of a due process violation was its perception that respondent may have experienced a "fear of prosecutorial vindictiveness," which could "chill" the exercise of his right to stand trial (App. A, *infra*, 5a-6a). This Court's decisions establish, however, that due process violations lie "not in the possibility that a defendant might be deterred from the exercise of a legal right * * *, but rather in the danger that the State might be retaliating against the accused." *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 363. See also *Corbitt* v. *New Jersey*, 439 U.S. 212, 218 (1978) ("not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid").[8] Accordingly, this Court has held that the Due Process Clause is not violated in the absence of "a realistic likelihood of 'vindictiveness' " (*Blackledge* v. *Perry*, *supra*, 417 U.S. at 27), or a "real threat of vindictiveness" that is more than "de minimis" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 26, 28 (1973)).[9] There is no realistic likelihood of vindictiveness in a case such as this.

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[8] In this case, there is not the slightest evidence that respondent's exercise of any procedural right was "chilled" by the prosecutor's actions. Respondent insisted on his right to stand trial and received a trial on the merits. Thus, respondent "was not himself 'chilled' in the exercise of his right [to stand trial] * * * and we doubt that the 'chill factor' will often be a deterrent of any significance." *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 33 (1973).

[9] "Put another way, the mere appearance of vindictiveness is not enough. * * * [T]he factual situation must pose a realistic likelihood of vindictiveness." *United States* v. *Andrews*, 633 F.2d 449, 455 (6th Cir. 1980) (en banc). The standard, moreover, is "an objective one." It "does not depend on a defendant's subjective impressions." *Id.* at 454.

For the same reasons that the court of appeals found that there was not actual vindictiveness, there also was no realistic likelihood of vindictiveness. First, the prosecutor never threatened the accused with increased charges. If the prosecutor had in fact desired to chill the exercise of respondent's right to stand trial, he would have threatened respondent with an increase in charges to obtain a waiver of the constitutional right. Second, the hearing before the district court showed that the event that precipitated the increase in charges was the prosecutor's discovery of new information bearing on the severity of respondent's criminal behavior. The prosecutor who preferred the increased charges never engaged in plea discussions with the accused.[10] Finally, the original charges that the prosecutor deemed to be inadequate were charges filed by a police officer, not charges preferred by an attorney. The prosecutor who preferred the increased charges was informed of material facts that were unknown when the police officer filed the original charges.[11] In these circumstances, the rule announced by the Sixth Circuit in *United States* v. *Sturgill*, 563 F.2d 307, 309-310 n.3 (1977), has direct application:

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[10] Ms. Bruce, the original prosecuting attorney who appeared before the magistrate, merely responded to a *defense inquiry* about a possible guilty plea. The successor prosecutor, Mr. Norton, did not even discuss the possibility of a guilty plea. And it was Mr. Norton, not Ms. Bruce, who evaluated the case as part of his pretrial preparation and decided to obtain a felony count nearly six weeks after respondent elected to stand trial.

[11] For example, the prosecutor who obtained the felony count relied heavily on the fact that the accused committed perjury and fled the jurisdiction to evade trial *after* the original charges were lodged by the police officer. See App. E, *infra*, 31a.

> The original complaint was signed by a supervisory security assistant at the Naval Ordnance Station. * * * [W]e think that additional charges in the information would probably be justified, even if the potential sentence was significantly increased. To hold otherwise would unduly restrict the prosecuting attorney from making an independent examination of the criminal conduct and substituting his formulation of the appropriate charges in place of the lay person's. In such a situation it does not appear that there is a "realistic likelihood of vindictiveness."

4. Finally, even if any residual appearance of vindictiveness existed on this record, the prosecutor completely rebutted that appearance. The showing that he made, which was not contradicted by respondent, dispelled any suggestion of retaliation or vindictiveness. The prosecutor stated in his affidavit that respondent's decision to stand trial was not even considered in seeking enhanced charges. The enhanced charges were required by the gravity of respondent's misconduct, his long history of violent crime, his continuing involvement in major narcotics violations, his perjury before the magistrate, and his flight from Maryland to evade trial.

As this Court previously has held, the appearance of vindictiveness is adequately dispelled if nonvindictive reasons for the challenged conduct "affirmatively appear." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 726; *Blackledge* v. *Perry*, *supra*, 417 U.S. at 29 n.7. See also *Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 223 ("We discern no element of retaliation or vindictiveness against Corbitt for going to trial. There is no suggestion that he was subjected to unwarranted charges. Nor does this record indicate that he was being punished for exercising a

constitutional right"). Thus, assuming that respondent made out a prima facie claim calling for some explanation by the prosecutor of his actions, the requirement that non-vindictive reasons "affirmatively appear" was fully satisfied in this case.

It is essential that, during the pretrial phase of a criminal case, the prosecutor enjoy reasonable latitude to rebut charges of "vindictiveness" raised by defendants. During the pretrial phase of a criminal case, prosecutors frequently receive additional information requiring a modification of the charges originally preferred. At the same time, the accused frequently exercises a variety of procedural rights under the Constitution, federal statutes, the Federal Rules of Criminal Procedure, and local rules of court. If the prosecutor is not afforded reasonable latitude to explain that an increase in charges (or other action contrary to the interests of the defendant) is independent of the defendant's exercise of a procedural right, the defendant's invocation of such a right will serve as a blanket immunity sheltering him from additional criminal charges however well founded. While a defendant arguably is entitled to expect to be free from actual retaliation (but see *Bordenkircher* v. *Hayes*, *supra*), he has no legitimate expectation of freedom from enhanced charges based on newly discovered information or a reappraisal of his case in light of additional indications of dangerousness to society.[12]

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[12] The practical consequences of an expansive interpretation of the "vindictive prosecution" doctrine in the pretrial phase of a criminal prosecution were recently explored by the Sixth Circuit, sitting en banc, in *United States* v. *Andrews*, *supra*. The majority dealt with those practical problems by prescribing a high threshold requirement for defendants seeking to

All of the other circuits that have considered what showing the prosecutor must make to rebut an allegation of "vindictiveness" would accept the explanation provided by the prosecutor in this case. The result reached by the Fourth Circuit here is in direct conflict with the other circuits. In the Fifth Circuit, for example, "the prosecutor may rebut * * * prima facie proof [of vindictiveness] by establishing [that] his reasons for adding the * * * new charges were other than to punish a pesky defendant for exercising his legal rights." *Hardwick* v. *Doolittle*, 558 F.2d 292, 301 (1977). The Fifth Circuit added that "explanations which would negate vindictiveness could include mistake or oversight in the initial action, *a different approach to prosecutorial duty by*

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establish a prima facie case of vindictive prosecution (633 F.2d at 454-455) and by affording prosecutors substantial latitude to rebut prima facie showings of vindictiveness (*id.* at 456). In his dissenting opinion in *Andrews*, Judge Merritt warned of the dangers of an expansive interpretation of the vindictiveness doctrine in this context (*id.* at 459):

> During the pretrial and trial process, the prosecutor must decide what position to take on an endless variety of procedural, evidentiary, substantive and tactical questions. He may oppose motions to suppress evidence or for the appointment of counsel or refuse to agree to discovery, severance, bail, or plea bargaining. * * * Once a defendant has successfully asserted a particular legal right in the course of the criminal process * * * is the prosecutor arguably guilty of unconstitutional vindictive conduct * * * each time the prosecutor thereafter takes a position contrary to the interests of the defendant?

In view of this practical concern, Judge Kennedy concluded (*id.* at 461) that courts should "find very few cases in the pre-trial stage in which the prosecutor's conduct appear[s] impermissibly to retaliate for the defendant's exercise of a constitutional right * * *."

the successor prosecutor, or public demand for prosecution on the additional crimes allegedly committed. The list is intended to be illustrative rather than exhaustive." *Ibid.* (emphasis supplied). Accord, *Jackson* v. *Walker*, 585 F.2d 139, 148-149 & n.20 (5th Cir. 1978); *Miracle* v. *Estelle*, 592 F.2d 1269, 1276-1277 & n.14 (5th Cir. 1979) (noting that "[a]n increase in the severity or number of charges if done without vindictiveness may be easily explained").

The Second Circuit also recognizes that a different approach by a successor prosecutor is sufficient to rebut a charge of vindictiveness. See *United States* v. *Ricard*, 563 F.2d 45, 48 (1977) ("Another attorney had originally handled the case and filed the information charging a misdemeanor. The case was later assigned to [a successor prosecutor], and when she reviewed the file several weeks before the trial date, she realized that the facts warranted adding a felony charge"). Similarly, the Sixth Circuit sitting en banc recently has held that increased charges may be justified simply because the prosecutor who obtained the original charges "was inexperienced" and failed to recognize the appropriateness of additional charges. *United States* v. *Andrews*, *supra*, 633 F.2d at 456.

The Ninth Circuit has held that a prosecutor need only show "that his decision to re-indict with more severe charges was 'justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness.' " *United States* v. *Burt*, 619 F.2d 831, 836 (1980); accord, *United States* v. *Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980).[13] And the Seventh Circuit affords the prosecutor

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[13] An earlier decision of the Ninth Circuit, handed down before this Court's decision in *Bordenkircher* v. *Hayes*, *supra*, suggested in dictum that the prosecutor bears a "heavy bur-

equally broad latitude in rebutting claims of vindictiveness. See *United States* v. *Anderson*, 514 F.2d 583, 588 (1975) ("The decision to prosecute [the defendant] for the more serious offense can on its face be explained in terms other than vindictiveness * * *").

The decision of the Fourth Circuit in this case, refusing to consider the prosecutor's actual reasons for increasing the charges and requiring dismissal of those charges notwithstanding the verdict of the jury, is in direct conflict with the foregoing decisions of the other circuits. Due to the importance of the issue and the frequency with which it is litigated in the lower courts, this Court should grant the petition and resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

ROBERT J. ERICKSON
Attorney

JUNE 1981

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den" to dispel any appearance of vindictiveness. See *United States* v. *Ruesga-Martinez*, 534 F.2d 1367, 1369-1370 (9th Cir. 1976). In that case, however, the prosecutor proffered "absolutely no evidence that justifies the increase in the charges * * *." *Id.* at 1369.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5351

UNITED STATES OF AMERICA, APPELLEE

v.

LEARLEY REED GOODWIN, APPELLANT

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Herbert F. Murray, District Judge

Argued November 14, 1980 Decided January 9, 1981

Before WINTER, BUTZNER, and WIDENER,
Circuit Judges

WINTER, Circuit Judge:

Convicted of forcible assault of a federal officer in violation of 18 U.S.C. § 111 and fleeing and eluding a police officer in violation of 18 U.S.C. §§ 7 and 13 and Md. Code Ann., Transp. Art., § 21-904, Learley Reed Goodwin appeals. We hold that his conviction of violating § 111 must be reversed, because, under the circumstances of this case, he was denied due process of law when he was indicted and tried for

that offense only after he exercised his right to a jury trial on the petty offense and misdemeanor charges originally lodged against him for the same conduct. We see no infirmity, however, in his other conviction, and we affirm the judgment entered thereon.

I.

Early in the evening of February 2, 1976, defendant was stopped for speeding on the Baltimore-Washington Parkway by a United States Park policeman. After defendant stopped, he emerged from his car to talk to the policeman. The policeman returned with him to the passenger side of defendant's car, and, after obtaining information from defendant's license and registration, the officer directed his flashlight into defendant's car. The officer saw a clear plastic bag underneath the armrest next to the driver's seat. He then asked defendant to get into the car and to raise the armrest. Defendant did so, but, as he uncovered the bag, he grabbed it, threw it onto the floor, placed the car into gear and rapidly accelerated. As the car started forward, it "fishtailed", striking the officer and knocking him onto the back of the car and then onto the highway. When the officer recovered himself, he returned to his car and, with lights flashing and siren sounding, pursued defendant at a speed reaching ninety-five miles per hour. Nevertheless, defendant eluded the officer in heavy traffic in the District of Columbia.

The next day the officer filed a complaint in the district court charging defendant with various petty offenses and misdemeanors, including assault. A United States Magistrate issued a warrant for defendant's arrest, and on March 11, 1976, defendant was arrested. On March 30, 1976, he was brought

before a magistrate. At that hearing defendant sought to have the charges against him dismissed by testifying that he was in Atlanta, Georgia when the incident on the parkway occurred. The magistrate, however, found probable cause, released defendant on personal recognizance, and set a trial date of April 29, 1976.

Defendant did not appear for trial on that date. Later he was found in custody in another jurisdiction on other charges. He was returned to Maryland on May 24, 1979, for trial. At that time the government was represented by a trial attorney from the Department of Justice who was on special detail for two weeks to try petty offenses and misdemeanors before the magistrate. The attorney was familiar with the court papers as well as the officer's incident report, and she had conducted plea negotiations with defendant's lawyer. These negotiations had come to naught because defendant declined to plead and instead elected a jury trial. During the discussions, the prosecutor did not mention the possibility that the United States would seek to have defendant indicted for the felony of forcible assault on a federal officer (18 U.S.C. § 111).

As a result of defendant's election to be tried by a jury, his case was transferred to the district court for trial. The United States Attorney then sought and obtained the indictment charging defendant with a violation of 18 U.S.C. § 111. By affidavit the United States Attorney spelled out his reasons for this action: (1) defendant's conduct on February 2, 1976 was considered to be a serious violation of law, (2) defendant had a lengthy history of violent crime, (3) defendant's conduct on February 2, 1976 was considered to be related to major narcotics transac-

tions, (4) defendant was believed to have committed perjury when he testified at his preliminary hearing that he was in Atlanta, Georgia at the time of the incident on the Baltimore-Washington Parkway, and (5) defendant had failed to appear for trial on April 29, 1976.

Defendant was convicted on the felony charge under 18 U.S.C. § 111 as well as the misdemeanor charge of fleeing or eluding a police officer in violation of Maryland law. His motion to set aside the verdict with respect to § 111 on the ground of prosecutorial vindictiveness was denied on the merits, the district court ruling that there was good cause why the motion was not filed pre-trial as ordinarily required by Rule 12, F.R. Crim. P.

II.

On this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment. We must nevertheless decide if the felony prosecution was improper where, as is obvious here, it was not instituted until after defendant elected to be tried by a jury on lesser charges arising from the same conduct, even though the facts which motivated the prosecutor to seek the indictment were available to the government before plea bargaining was conducted and before defendant elected to exercise his right to a jury trial.

The answer to the issue which confronts us is found in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); *Blackledge* v. *Perry*, 417 U.S. 21 (1974); and *United States* v. *Johnson*, 537 F.2d 1170 (4 Cir. 1976), where we construed and applied *Pearce* and *Blackledge*. Briefly stated, *Pearce* held that the due process clause protects a defendant from both actual

vindictiveness and the fear of retaliation for exercising his right to appeal. Thus, *Pearce* held that a defendant convicted on retrial after having successfully attacked his first conviction could not be subjected to a more severe sentence except upon "objective information concerning identifiable conduct" occurring after the time of the original sentence. 395 U.S. at 726. *Blackledge* applied this principle to the prosecutor in a case where a defendant requested a de novo trial in a court of record following a misdemeanor conviction in a magistrate's court. It held that the prosecutor could not constitutionally respond to a defendant's invoking his statutory right of appeal by bringing a more serious charge against him prior to the trial de novo, at least where the basis for the more serious charge did not arise after the original conviction. In *Blackledge*, the court specifically noted that there was no evidence of actual prosecutorial vindictiveness. Nevertheless, the court found a violation of due process since the circumstances of the case presented "a realistic likelihood of 'vindictiveness.'" 417 U.S. at 27. In *Johnson* we held that the due process guarantee against actual and potential prosecutorial vindictiveness prohibited the government from bringing more serious charges against a defendant who was successful in upsetting his guilty pleas to some of the charges for which he was originally indicted, notwithstanding that the record did not establish that the prosecutor maliciously sought the second indictment. We stressed that the rationale of *Pearce* and *Blackledge* was that, since the *fear* of prosecutorial vindictiveness, as well as *actual* vindictiveness, had a chilling effect on a defendant's right to appeal, to attack his conviction collaterally, or to be tried de novo, the due process clause required that a defendant be freed of the ap-

prehension of such a retaliatory motivation as well as actual retaliation.

Applied to this case, this well-established principle manifestly requires that defendant's felony conviction be set aside. Defendant had a constitutional right to a jury trial on the misdemeanor and petty offense charges. The due process clause would not permit retaliation for the exercise of the right. Under *Blackledge*, we need not determine whether retaliation actually occurred in the case. It is enough that the circumstances surrounding the felony indictment give rise to a genuine risk of retaliation. Lest exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges, once the right was exercised, at least where there is no showing that the charges could not have been brought before defendant made his election for a jury trial.

We turn to the government's arguments as to why we should reach a different conclusion. First, the government contends that the more recent Supreme Court decision in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), undercuts defendant's reliance on the apprehension of vindictiveness as a basis for finding a due process violation. In *Bordenkircher*, the Court held that a prosecutor does not violate due process by threatening to increase charges in the course of plea bargaining and then following up on that threat after plea negotiations break down. *Bordenkircher* is easily distinguishable from *Blackledge* and from the present case. In *Bordenkircher* the prosecutor's intent to press for more serious charges was made known at the outset of negotiations, and the Court explicitly limited its holding to that factual situation:

> This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes [on the more serious charge] from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.

434 U.S. at 360-61. Specifically distinguishing *Blackledge*, the Court noted:

> In [*Blackledge*] the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation 'very different from the give-and-take negotiation common in plea bargaining. . . .'

Id. at 362 (citations omitted).

The government relies on one passage from *Bordenkircher* which purportedly limits the rationale of *Blackledge:*

> The Court has emphasized that the due process violation in cases such as [*Blackledge*] lay not in the possibility that a defendant might be deterred from the exercise of a legal right, see *Colten* v. *Kentucky*, 407 US 104, 32 L Ed 2d 584, 92 SCt 1953; *Chaffin* v. *Stynchcombe*, 412 US 17, 36 L Ed 2d 714, 93 S Ct 1977, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction. See *Blackledge* v. *Perry, supra*, at 26-28, 36 L Ed 2d 714, 92 S Ct 1977.

434 U.S. at 363. From this, the government argues in its brief that the Court shows "its fundamental concern was actual, rather than the defendant's perceived, prosecutorial retaliation." We think, however, that the government has missed the point. *Colten* and *Chaffin*, cited by the Supreme Court in the quoted passage, found the rationale of *Blackledge* inapplicable where, upon retrial, a defendant was subjected to more than his initial punishment by a jury wholly unaware of the punishment following the initial conviction or by a judge different than the one who imposed the original sentence. In those cases, even though the possibility of increased punishment might have deterred a defendant in exercising his right to appeal, the deterrent did not rest on the possibility of retaliation since the judge or jury in the second trial had no reason to be vindictive. In citing *Colten* and *Chaffin*, therefore, the Supreme Court suggests only that a deterrent arising solely from the risk of higher punishment may be permissible while a deterrent arising from the risk of vindictiveness is not.

Unlike the defendants in *Colten* and *Chaffin*, but like the defendant in *Blackledge*, Goodwin faced increased charges brought by a prosecutor who had an incentive to deter misdemeanor defendants from exercising a right that would "require increased expenditures of" his own time. *Blackledge*, *supra*. 417 U.S. at 27. Thus, for defendant and those similarly situated, "the danger that the [government] might be retaliating" is real. *Bordenkircher*, *supra*, 434 U.S. at 363.

Next the government argues that we should reconsider *Johnson*. It stresses that the Fifth and Sixth Circuits have adopted a balancing test in cases which involve prosecution on increased charges after a de-

fendant's exercise of procedural rights, weighing the extent to which the allowance of increased charges will chill a defendant's exercise of his rights against the extent to which disallowance will limit the exercise of the prosecutor's discretion. *See United States* v. *Andrews*, —— F.2d —— (6 Cir. Sept. 30, 1980); *Jackson* v. *Walker*, 585 F.2d 139, 145 (5th Cir. 1978); *Hardwick* v. *Doolittle*, 558 F.2d 292 (5 Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978).[1] In short, the government takes strong exception to our holding in *Johnson* that circumstances giving rise to a genuine risk of vindictiveness create a *per se* violation of the due process clause, absent proof by objective evidence that the increased charges could not have been brought in the first instance.

To this argument, there are several answers. First, it is inappropriate for us to overrule the decision of another panel of this court. Such a step is reserved for the court sitting in banc. More importantly, we are persuaded that our initial reading of *Blackledge* was correct and should not be altered. *Blackledge* suggests no balancing test. It adopts a prophylactic rule designed to spare courts the unseemly task of probing the actual motives of the prosecutor in cases where objective circumstances suggest a realistic possibility of vindictiveness.

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[1] These cases hold that, once a defendant establishes a risk of vindictiveness, the burden shifts to the government to prove a legitimate reason for the increased charges. To the extent that these cases permit the government to rebut defendant's prima facie showing through objective proof that the increased charges could not have been brought in the first instance, they do not depart from our holding here. To the extent that they permit a more far-reaching inquiry into the actual motivation of prosecutors, we are not persuaded that they comport with the prophylactic rule set forth in *Blackledge*.

If the government wishes to avoid the limitation on prosecutorial discretion dictated by *Blackledge*, it must come forward with objective evidence to show that the increased charges could not have been brought before the defendant exercised his rights. This it has not done in the instant case. Although the information which led the United States Attorney to seek a felony indictment may not have been in his possession until defendant exercised his right to a jury trial and the case was transferred from the magistrate to the district court, the information was available to the government, if not from the outset, at least prior to Goodwin's election of a jury trial.[2] Nevertheless, the conclusion is inescapable that, "but for" his election of a jury trial, defendant would have been tried before the magistrate solely on the lesser charges.

Thus we hold that the due process clause prohibits defendant's conviction on the felony charge and that conviction must be reversed. Because of this conclusion, we have no occasion to consider defendant's contention that the evidence was legally insufficient to convict him of the felony charge.

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[2] Even at the magistrate level, the government was not unrepresented. We reject the argument that the lawyer from the Department of Justice on temporary assignment was not generally an "attorney for the government" within the meaning of F. R. Crim. P. 54(c) since she appeared with the apparent consent of the United States Attorney. We also reject the government's invitation to explore the internal functioning of the federal prosecutorial system in order to determine how, when, and why particular bits of information came to the attention of particular officials. This is precisely the sort of inquiry that the prophylactic approach of *Blackledge* seeks to avoid.

III.

Defendant argues for reversal of his conviction under the Maryland fleeing and eluding statute on two grounds. First he contends that Count III of the indictment failed to allege all the elements of an offense under Maryland law because it did not state that the police officer was in uniform, prominently displaying his badge or other insignia of office. Next he contends that, even if he was properly charged under the terms of the statute, the Maryland statute has been preempted by federal law. Neither contention persuades us.

A. The Requirements of the Maryland Statute.

The Maryland statute which defendant was convicted of violating prohibits the driver of a vehicle from attempting to elude a police officer by failing to stop, by fleeing on foot or by any other means. The statute applies:

> [W]hen a police officer gives a signal to stop, whether by hand, voice, emergency light, or siren, if:
>
> > (1) The police officer is in uniform, prominently displaying his badge or other insignia of office; *and*
> > (2) The police officer, when in a vehicle, is in a vehicle appropriately marked as an official police vehicle. (emphasis added)

Ann. Code of Md., Transp. Art., § 21-904.

While the indictment charged that defendant attempted to elude a police officer who had given him a visual and audible signal to stop and who was in a vehicle appropriately marked as an official police

vehicle, it did not allege that the officer was in uniform, prominently displaying his badge or other insignia of office. Defendant contends that because the two conditions set forth in the statute are stated in the conjunctive, both must be alleged and proved, and therefore the count of the indictment alleging the Maryland crime is fatally defective because only one of the conditions is alleged.

There can be no doubt that the conditions of the statute are phrased in the conjunctive, but they can be read in the disjunctive if that is the evident legislative intent. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *George Hyman Construction Co.* v. *OSHA*, 582 F.2d 834, 840 n.10 (4 Cir. 1978). We think that the common-sense meaning of the statute is that it applies if the officer is in uniform and is prominently displaying his badge, but that the statute applies also if the police officer, however garbed, is in an officially marked car. The purpose of the statute is to effect compliance with an officer's signal to stop. Not unreasonably, notice of the authority of the officer to give the signal is an essential element of the crime of failing to obey. That notice is given when the officer is on foot and is wearing his uniform and insignia of office, *or*, if the officer is in a vehicle, when the vehicle is marked as an official police vehicle. In the latter instance, additional notice from the wearing of a uniform and displaying an insignia of office is unnecessary, especially when it is remembered that the garb of the policeman within the official police vehicle may not even be visible.

A contrary reading would lead to some bizarre results. If both conditions must be alleged and proved in order to render § 21-904 applicable, a motorist with impunity could ignore a signal to stop from a

plainclothes policeman in an official police car or an off-duty policeman in an official car. We do not think that these possibilities were intended by the Maryland legislature.

B. Preemption of the Maryland Statute.

The principles of preemption to preclude the bringing of charges under the Assimilative Crimes Act, 18 U.S.C. § 13, have recently been canvassed by us in *United States* v. *Eades*, 615 F.2d 617 (4 Cir. 1980) and —— F.2d —— (4 Cir. 1980) (in banc), and need not be repeated here. Defendant claims preemption by 36 C.F.R. § 50.29(b) which provides:

> All traffic regulations applicable in areas covered by this part shall be observed by the operators of vehicles, equestrians, and by pedestrians who shall also comply with official traffic signs and signals, and traffic direction by voice, hand or whistle, from any member of the United States Park Police, Metropolitan Police, Park Rangers or special policemen, properly equipped with police badge on duty in an area covered by this part. These directions may include signals for slowing down, stopping, backing, approaching or departing from any place, the manner of taking up or setting down passengers, and the loading and unloading of any material.

Although defendant concedes that the regulation does not track the language of § 21-904, he argues that the regulation governs the same generic acts as the statute proscribes, particularly since a signal to stop given by a police officer is an element of the statutory crime.

We are not persuaded. As its text demonstrates, the thrust of the statute is to render criminal eluding a police officer under the circumstances therein defined. The thrust of the regulation is traffic and pedestrian control by an officer on foot. The objectives of the statute and of the regulation are quite different. Indeed we do not think that defendant could have been found guilty of violating the regulation. It makes criminal disobedience of "voice, hand or whistle" directions; defendant was convicted of eluding the emergency light and siren signals given by the police officer. We see no preemption.

AFFIRMED IN PART;
REVERSED IN PART.

WIDENER, Circuit Judge, concurring and dissenting:

While I concur in th result obtained by the majority in affirming the conviction of the misdemeanor of fleeing and eluding a police officer, I respectfully dissent to overturning the conviction of the felony of assaulting an officer in violation of 18 U.S.C. § 111.

As the majority correctly notes, *Bordenkircher* "held that a prosecutor does not violate due process by threatening to increase charges in the course of plea bargaining and then following up on that threat after plea negotiations break down." [See 6a, *supra*]. Applying *Bordenkircher* to our case, if the government had threatened to prosecute Goodwin for assaulting the officer during the plea negotiations which did take place, and then had indicted Goodwin for that crime when the plea negotiations broke

down, such conduct would have been approved under *Bordenkircher*. But because of the lack of a threat by the prosecutor to indict, the majority sets aside the conviction because "the circumstances surrounding the felony indictment [the assault on the officer] give rise to a general risk of retaliation." [See 6a, *supra*]. The court now holds that while an expressed threat of retaliation will not suffice to set aside a conviction because of *Bordenkircher*, merely a general risk of retaliation without the expressed threat will suffice. If we analyze what the prosecutor did in *Bordenkircher*, we see that in that case he deliberately threatened the defendant with indictment for an additional offense in order to discourage trial, and to encourage a guilty plea, and the prosecutor expressly so advised the defendant before trial. *Bordenkircher* at 358, n. 1. In our case, there is no intimation that the prosecutor was acting with vindictiveness in seeking the indictment for assaulting the officer, and the majority so finds. [See 4a, *supra*]. Neither did he make any attempt to discourage any exercise of Goodwin's right to trial by jury. Thus, what the majority now adopts is a *per se* rule, the effect of which is that a prosecuting attorney must see to it that formal charges are *initially* filed for the most serious offense of which a defendant may be guilty or else forever forfeit the right to so prosecute him if the defendant contests the prosecution in any way.

I doubt that we should follow our *Johnson* case so far and that it is any authority for the proposition relied upon following the decision in *Bordenkircher*. An en banc court is not needed, of course, to accept a superseding opinion of the Supreme Court, and, as we had to, we have so held in *Marzullo* v. *Maryland*, 561 F2d 540 (1977).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

January 9, 1981

To: Paul W. Spence, Esq.

Edward M. Norton, Jr., Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 79-5351 this date.

The Court's opinion is enclosed.

WILLIAM K. SLATE, II
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5351

UNITED STATES OF AMERICA, APPELLEE

versus

LEARLEY REED GOODWIN, APPELLANT

ORDER

The appellee's petition for rehearing and suggestion for rehearing in banc have been submitted to the court. A poll was requested on the suggestion for rehearing in banc, but it lost for lack of a majority of votes by the judges eligible to vote. Judge Widener voted to grant rehearing.

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Winter with the concurrence of Judge Butzner. Judge Widener dissents from the denial of rehearing.

Filed April 16, 1981

For the Court,

/s/ William K. Slate, II
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Criminal No. HM-79-1298

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

ORAL OPINION OF THE DISTRICT COURT DATED NOVEMBER 7, 1979

* * * * *

THE COURT: I would like to decide this motion now, having heard the arguments of counsel, and I am going to read a brief bench opinion in connection with it.

The Defendant Learly Reed Goodwin was convicted by a jury in this Court on September 12, 1979 on Count One of a three-count indictment. Count One charged the Defendant with wilfully and forceably assaulting, resisting, opposing, impeding, intimidating and interfering with an officer of the United States Park Police while the officer was engaged in the performance of his official duties, and with using a deadly and dangerous weapon, an automobile, in the commission of the offense.

The incident which gives rise to the charges occurred on February 2, 1976 on the Baltimore-Washington Parkway. The officer involved, Officer Morrissette, filed an appropriate complaint against the Defendant on February 3, 1976. The charges in that complaint were misdemeanors or perhaps some petty offense charges. In March of 1976 a trial of the issues before Magistrate Burgess was set for April

29, 1976. Because the Defendant did not appear for trial and was out of the jurisdiction, there were no further proceedings before Magistrate Burgess until May 24, 1979, when the Defendant refused to consent to be tried before the Magistrate and requested a jury trial. On July 3, 1979, the Grand Jury returned the three-count indictment already referred to.

The Defendant now moves that Count One of the indictment be dismissed, alleging that the prosecution's decision to seek a felony indictment after the Defendant refused to waive his right to a jury trial creates an "appearance of vindictiveness" that violates his due process right to seek a jury trial without fear of retaliation by the prosecution. For the reasons to be set out in this opinion, the Court has reached the conclusion that the motion must be denied.

The Government points out that the motion is not timely filed in accordance with Rule 12(b) of the Federal Rules of Criminal Procedure. Although the Government at argument today has indicated a preference to have the Court proceed and to decide the case on the merits of the issues presented, the Defense has submitted its arguments orally today on the Rule 12(b) point and the Court will deal briefly with it.

Rule 12(b) provides in part:

"(b) Pre-trial Motions. Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

"(1) Defenses and objections based on defects in the institution of the prosecution."

Rule 12(f) provides in part that "Failure by a party to raise defenses or objections or to make requests which must be made prior to trial shall constitute waiver thereof . . ." Because the Defendant's motion falls within Rule 12(b)(1), and was not filed prior to trial, the Defendant technically waived his rights to raise the issue. However, Rule 12(f) further provides that a court may grant relief from waiver "for cause shown."

The Fourth Circuit has held that ". . . relief from . . . waiver is an exercise of extraordinary power and must be regarded as an exception to the rule." *United States* v. *Almo*, 544 F.2d 1215 at 1217 and 18 (4th Cir. 1976). This circuit's two-pronged test requires that the movant show both actual prejudice stemming from the right denied him and "cause" as prescribed in the rule. In the Court's view, Mr. Goodwin has met the two requirements. He will suffer actual prejudice if not allowed to challenge the propriety of Count One. It has been held that "cause" includes the danger that a criminal defendant will be penalized for the inadvertence of his attorney, *United States* v. *Hall*, 565 F.2d 917 (5th Cir. 1978), and the Defendant's attorney in this case has admitted that the only reason for the delay in filing the motion was his own inadvertence. The Court will grant relief from the waiver and decide the motion on its merits.

The basis of Defendant's motion is a doctrine, developed under the due process clause, which seeks to protect the ability of a criminal defendant to pursue his or her constitutional, statutory or common-law procedural rights without fear of retaliation by a sentencing judge or a prosecutor. The goal is to eliminate even the appearance of vindictiveness that results when a defendant successfully challenges an original charge, and the judge imposes a stiffer sentence upon the defendant's second conviction, or the

prosecutor increases the charges in an indictment or information. The leading cases are *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) and *Blackledge* v. *Perry*, 417 U.S. 21 (1974).

As Mr. Spence has argued, it is the appearance of vindictiveness that is crucial, not any actual retaliatory intent. *Blackledge* v. *Perry*, 417 U.S. at 28; *U.S.* v. *Ruesga-Martinez*, 534 F.2d 1367 at 1369 (9th Cir. 1976).

It is clear that the doctrine applies to a defendant who refuses to be tried by a magistrate and requests a jury trial instead. See in that connection *U.S.* v. *Ruesga-Martinez*, already cited.

The first question is whether an appearance of vindictiveness exists. In the majority of cases dealing with the issue, the entity that filed the original charges against the defendant was the same entity that later increased the charges. *See*, for example, *U.S.* v. *Jameson*, 505 F.2d 407 (D.C. Cir. 1974); *U.S.* v. *Andrews*, 444 F. Supp. at 1238 (E.D. Mich. 1978). In the present case, Officer Morrissette filed the original complaint, while the Assistant United States Attorney, Mr. Norton, sought the later indictment. Nevertheless, the Court finds there is an "appearance of vindictiveness" here as that term is used in the cases.

The Supreme Court stated in *Blackledge* v. *Perry* at Pages 27 and 28 of 417 U.S.:

"A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealling and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may

even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendands will brave the hazards of a *de novo* trial."

That language applies equally well to the circumstances here, and raises the issue of retaliation.

The next question, therefore, is whether the prosecution has adequately dispelled any appearance of vindictiveness. The case law establishes that a prosecutor may be justified in increasing the charges against a defendant if he or she can show that not all the essential elements of the greater offense existed when the original complaint was brought; or if he or she can show the discovery of new evidence of which the Government was unaware, through no fault of its own, at the time of the original charge. *U.S.* v. *Jamison*, 505 F.2d at 415. *See also U.S.* v. *Andrews*, 444 F. Supp. 1238 at 1241 and *Blackledge* v. *Perry*, 417 U.S. at 28 and 29.

Although the question is a close one, the Court finds that the prosecutor in this case has adequately dispelled any appearance of retaliatory intent. In his affidavit attached to the Government's opposition to the motion, the Assistant United States Attorney stated that he did not receive all the information relating to the charges against Mr. Goodwin until June 11, 1979, and that he did not read the information and decide to seek an indictment until some time thereafter. Unlike the prosecutor in *U.S.* v. *Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977), in which a motion to dismiss the indictment was granted, the Assistant U.S. Attorney in this case did not know of the Defendant's prior record until after the Defendant

requested a jury trial. Since the prosecutor was not aware of the additional information on which the indictment was based until after the May 24th proceedings before Magistrate Burgess, it appears far less likely that he was motivated by any vindictiveness.

The Defendant intimates that because the Government had *access* to all the pertinent information prior to May 24, 1979, since a representative of the Antitrust Division of the Department of Justice was appointed for a two-week tour of duty before Magistrate Burgess in the prosecution of misdemeanors and petty offense type cases that the impermissible appearance of vindictiveness remains. However, the case law does not imply, and the due process clause does not require, that the prosecutor carry such a heavy burden of acquiring all information which is potentially available to him at a given time.

For all the foregoing reasons, the Defendant's motion to dismiss Count One of the indictment must be denied, and I will ask Mr. Norton to submit an appropriate order to that effect.

Thank you, gentlemen.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM-79-0298

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

ORDER

Defendant Learley Reed Goodwin's Motion to Dismiss Count One of the Indictment is hereby denied for the reasons stated at the hearing held on November 7, 1979.

/s/ Herbert F. Murray
HERBERT F. MURRAY
United States District Judge

Filed November 14, 1979

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM-79-0298

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

AFFIDAVIT

CITY OF BALTIMORE)
STATE OF MARYLAND)

I, Edward M. Norton, Jr., Assistant United States Attorney for the District of Maryland, being duly sworn, deposes and states:

In late March 1979, I was asked by Assistant United States Attorney Robert Trout to call Ms. Pat Hand, secretary to Magistrate George Burgess of the United States District Court for the District of Maryland, to answer a question she had concerning the transfer of a prisoner from Virginia to the District of Maryland for trial. I called Ms. Hand, and she informed me that an individual named Learley Reed Goodwin, for whom a complaint for failure to appear for trial and a bench warrant had been outstanding in the District of Maryland since March 1976, had been located in jail in Arlington, Virginia

where he was awaiting sentencing. Ms. Hand further explained to me that she was experiencing difficulty in having Goodwin brought to the District of Maryland for trial. The authorities in Virginia would not release Mr. Goodwin to the United States Marshals because he had come to Virginia from the State of California where he had been in prison, and Virginia was obligated to return him to California under the Interstate Agreement on Detainers.

I told Ms. Hand that I would contact the appropriate officials in Virginia and California to work out a procedure for having Mr. Goodwin brought to the District of Maryland before he was returned to California. I did not discuss with Ms. Hand at that time any outstanding charges against Goodwin in the District of Maryland other than the complaint and warrant for failure to appear for trial.

I subsequently contacted Thomas Rawles Jones, Jr., Assistant Commonwealth's Attorney in Alexandria, Virginia and Irving Marks, Detainer Compact Administrator for the State of California. We agreed that the Sheriff of Alexandria, Virginia would release Goodwin to the custody of the United States Marshal for the District of Maryland upon presentation of a Writ of Habeas Corpus. After proceedings against Mr. Goodwin were concluded in the United States District Court for the District of Maryland, the United States Marshals would return Mr. Goodwin to the California Correctional Training Facility at Soledad, California. That agreement was confirmed in a letter dated May 7, 1979 from Assistant Commonwealth Attorney Jones to me. I communicated that agreement to Magistrate Burgess' secretary on May 16, 1979.

My discussions in April with Assistant Commonwealth's Attorney Jones dealt almost entirely with the procedure for returning Goodwin to Maryland. However, during those discussions, I believe I asked Mr. Jones about Goodwin's status in Virginia, and he told me Goodwin was awaiting sentencing after having been convicted of attempting to shoot a police officer and possession of heroin.

On June 11, 1979 I received a memorandum from Paul R. Schlitz, Clerk of the United States District Court, to which were attached the documents filed with Magistrate Burgess.

Subsequent to June 11, 1979, I reviewed those documents including the incident report dated February 2, 1976 and the Complaint filed on February 3, by Officer James M. Morrissette, United States Park Police, charging Mr. Goodwin with operating a vehicle in excess of the posted speed limit (2 counts), assault by striking, beating or wounding, failing to give aid, information, and identification at the scene of a personal injury accident and fleeing and eluding a police officer, all of which took place on the Baltimore Washington Parkway near Maryland Route 450 on February 2, 1976. I then contacted Officer Morrissette on the telephone and discussed the case with him. He confirmed the details set forth in his incident report dated February 2, 1976 and he provided me with additional information about Goodwin.

Officer Morrissette told me that several weeks after the incident on the Baltimore Washington Parkway on February 2, 1976, as charged in the complaint, Goodwin had appeared at a preliminary hearing before Magistrate Burgess and had testified that on February 2, 1976 he was in Atlanta, Georgia. According to Officer Morrissette, Goodwin testified that

he flew from Washington, D. C. to Atlanta the end of January 1976, leaving his car at National Airport with his keys and wallet under the front seat.

Officer Morrissette stated to me that he was certain that Goodwin's explanation at the preliminary hearing was untruthful and that Goodwin was the man whom he had stopped for speeding on the Baltimore Washington Parkway on February 2, 1976. Officer Morrissette related that when he first stopped Goodwin, Goodwin had given him a District of Columbia driver's license with his photograph on it, and he had not returned it to Goodwin before Goodwin fled the scene. Officer Morrissette told me that the man he stopped on the Baltimore Washington Parkway on February 2, 1976, the man whose photograph appeared on the District of Columbia driver's license he obtained at the scene, and the man who testified at the preliminary hearing were the same person, Learley Reed Goodwin. Therefore, Officer Morrissette concluded, Goodwin could not have been in Atlanta at the time of the incident on the Baltimore Washington Parkway on February 2, 1976.

During my initial conversation with Officer Morrissette, he also told me that subsequent to his arrest of Goodwin on February 2, 1976, he learned that Goodwin was known to Drug Enforcement Administration authorities and the Washington, D. C. police to be a major heroin dealer. Officer Morrissette related that Goodwin was associated with two individuals who smuggled heroin from Mexico and who were known to have flown heroin into airfields in Florida, Georgia and Maryland. More detailed information concerning Goodwin's drug activities could be obtained, according to Officer Morrissette, from the District of Columbia Narcotics Squad, and he

gave me the name of the officer in charge of the investigation of Goodwin. I did not contact that individual prior to seeking an indictment. However, after indictment and before trial, I did contact that individual who confirmed the information given to me by Officer Morrissette in June 1979.

Officer Morrissette also told me during the initial interview that he had attended Goodwin's trial in Alexandria, Virginia in February 1979. He stated that the charges in that case involved heroin dealings by Goodwin in 1976 shortly before the incident on the Baltimore Washington Parkway on February 2, 1976 and that Goodwin had failed to appear for trial in Virginia at the same time he failed to appear for trial in the United States District Court for the District of Maryland.

After my initial interview with Officer Morrissette, and before seeking an indictment, I again contacted Assistant Commonwealth Attorney Thomas Rawles Jones in Alexandria, Virginia. He told me that Mr. Goodwin had been sentenced to 18 years; 15 for possession of heroin with intent to distribute and 3 years for the attempted unlawful shooting of a police officer. He told me that Goodwin had appealed his conviction. Mr. Jones then gave me a detailed exposition of the evidence against Mr. Goodwin in the Virginia case including his arrest in December 1975 with over five hundred $20 bags of heroin in his possession and an ensuing violent struggle with the arresting police officers. Mr. Jones also related that he believed Mr. Goodwin's failure to appear for trial in the Circuit Court for Alexandria City on April 8, 1976 had been carefully staged with his attorney's assistance. According to Mr. Jones, one of Mr. Goodwin's partners in the distribution of heroin was his attorney George

Gates who was subsequently convicted of violations of the federal narcotics laws. I was aware that Mr. George Gates was the attorney who also represented Goodwin at the preliminary hearing before Magistrate Burgess on March 30, 1976 at which time Goodwin testified he was in Atlanta, Georgia on February 2, 1976, the date of the incident on the Baltimore Washington Parkway.

After my review of the court records, my initial interview with Officer Morrissette, and my discussions with Assistant Commonwealth's Attorney Jones, I decided to seek an indictment from the grand jury charging Goodwin with assaulting, resisting, or impeding a federal officer with a deadly weapon in violation of 18 U.S.C. § 111, assault with a dangerous weapon within the special territorial jurisdiction of the United States in violation of 18 U.S.C. § 113[(c)], fleeing and eluding a police officer in violation of 18 U.S.C. §§ 7 and 13 and the Transportation Article § 21-904, Ann. Code of Md., and failure to appear in violation of 18 U.S.C. § 3150. My reasons for seeking an indictment follow.

First, I considered Mr. Goodwin's conduct on February 2, 1976 to be a serious violation of law. He had intentionally resisted a United States Park police officer in the performance of his duties, striking the officer with an automobile, leaving him perhaps seriously injured on the highway, and fleeing through traffic at a high rate of speed, thus endangering the lives of other drivers.

Second, among the documents I received in the Court file from Magistrate Burgess was a copy of Goodwin's F.B.I. record. That record showed Mr. Goodwin's lengthy history of violent crime.

Third, based on my conversations with Officer Morrissette and Assistant Commonwealth's Attorney Jones, I judged Goodwin's conduct on February 2, 1976 to be related to major narcotics transactions.

Fourth, I believed Mr. Goodwin had committed perjury in his testimony under oath at the preliminary hearing before Magistrate Burgess on March 30, 1976.

Fifth, subsequent to the filing on the initial complaint on February 3, 1976, Mr. Goodwin had failed to appear for a trial scheduled for April 29, 1976.

In summary, my decision to seek an indictment charging Mr. Goodwin with two felonies, 18 U.S.C. § 111 and 18 U.S.C. § 113[(c)] was based upon the totality of the circumstances set forth above and upon my judgment that his conduct on February 2, 1976 involved not merely a traffic incident on the Baltimore-Washington Parkway but also serious violations of federal law committed by a dangerous individual. My decision to seek a grand jury indictment was not motivated in any way by, nor did I ever consider Goodwin's request for a trial by jury in the United States District Court.

/s/ Edward M. Norton, Jr.
EDWARD M. NORTON, JR.
Assistant United States Attorney

STATE OF MARYLAND)
) ss:
CITY OF BALTIMORE)

I HEREBY CERTIFY that on this 23rd day of October, 1979, EDWARD M. NORTON, JR., Assistant U.S. Attorney, who is known to me, appeared before me, a Notary Public for the State of Maryland, City of Baltimore, and made oath in due form of law that the facts contained herein are true to the best of his knowledge, information, and belief.

SUBSCRIBED AND SWORN TO BEFORE ME,

/s/ Mrs. Geraldine Zinser
MRS. GERALDINE ZINSER
Notary Public

My Commission Expires 7/1/82

[C.A. App. 66-72]

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ALEXANDER L. STEVAS,
CLERK

No. 80-2195

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner

v.

LEARLEY REED GOODWIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 26, 1981
CERTIORARI GRANTED NOVEMBER 30, 1981

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[DOCKET ENTRIES
BEFORE UNITED STATES MAGISTRATE]

DATE	PROCEEDINGS
1979	
2-2-76	Defendant charged with: (1) Fail to stop at Scene of Accident (2 (2) Speed 60/50 (3) Flee to Elude Police (4) Fail to give information and render aid (5) Assault by Striking, Beating or Wounding (7) Reckless Driving
2-3-76	Warrant Issued and Complaint Signed this date.
3-11-76	Defendant arrested by Officer Higgins, U.S. Court Bond Hearing before Magistrate Burgess, Defendant released on Personal Recognizance for 3-30-76. Attorney appeared George Gates, 1108 16th Street, N.W., Washington, D.C. 296-3824. Defendant attorney appeared and waived the 20 days rule for Preliminary on record.
3-30-76	Defendant and Attorney appeared. Preliminary Hearing Held. Probable Cause found. Trial set before Mag. Burgess for 4-29-76. Bond-[j]ump Charge Added.
4-20-76	Sent defendant summons for 4-29-7[6] trial date by Certified Mail. Return receipt was received in this office indicating that the summons sent has been received by Mr. Goodwin.
4-29-7[6]	Defendant did not appear. Warrant Issued $10,000 Cash Only.
5-16-79	Received call from the U.S. Marshals office that Mr. Goodwin was in the Alexandria Detention Center in Alexandria, Virginia on Virginia charges. Made arrangements for Mr. Goodwin to be transported to the U.S. District Court—Hyattsville for trial on 5-24-79. Appointed Eugene Zoglio, Suite 200, Executive Building, College Park, Maryland 779-8808 to represent defendant in Hyattsville.

DATE	PROCEEDINGS
5-24-79	Defendant transported to Court—Hyattsville. Attorney appeared. Attorney and Defendant appeared before Magistrate Burgess and requested a Jury Trial. Eugene Zoglio, Esq. does not wish to represent the defendant in trial in Baltimore.
	* * * Defendant does have Jail time to serve in California. The U.S. Marshals will transport the defendant to California when Jury Trial is completed. Defendant to be transported to California Training Facility, Soldad, California. * * *
5-31-79	All paperwork forwarded to Clerk, Baltimore, Maryland. Def. now in custody in Baltimore City Jail.

[DOCKET ENTRIES
BEFORE UNITED STATES DISTRICE COURT]

DATE		PROCEEDINGS
1979		
July 3	(1)	Indictment for violation of U.S.C., Title 18, Sections 111 & 1114; U.S.C., Title 18, Section 113(c); U.S.C., Title 18, Sections 7 & 13, Ann. Code of Md., Art. 66½, Sect. 11-904; U.S.C. Title 18, Section 3150—(Forcibly Assaulting a Federal Officer; Assault within the Maritime and Territorial Jurisdiction; Fleeing to Elude a Police Officer and Failure to Appear)
" "	(2)	Original Papers of U.S. Magistrate Burgess.
" 6	(3)	Order (Burgess, U.S. Magis.) dated March 11, 1976, releasing defendant on his personal recognizance as therein set forth.
" "	(4)	Order (Burgess, U.S. Magis.) appointing U.S. Public defender to represent defendant dated May 24, 1979.
" "	(5)	Appearance of Paul W. Spence, AFPD, as counsel for defendant.
" "	—	Defendant arraigned and plead "Not Guilty" as to all counts before Rosenberg, U.S. Magis.).
" "	(6)	Order (Rosenberg, U.S. Magis.) that defendant execute a bond in the amount of five thousand dollars ($5,000.00), as therein set forth.
" 20	(7)	Motion and Order (Murray, J.) extending the time for filing pre-trial motions from July 21, 1979 to July 30, 1979. (c/m 7/23/79 mdf)

DATE		PROCEEDINGS
1979		
" 30	(8)	Motion of Defendant for Severance, Memorandum and Request for Hearing. (2 c/s 7-30-79)
August 14	(9)	Response of United States to motion of defendant for Severance. (1 c/s 8/14/79)
" 16	(10)	Notice of defendant of Alibi. (2 c/s 8/16/79)
" 31	(11)	Petition of defendant for issuance of subpoenas at the expense of the United States Government and Order (Kaufman, J.) that Petition be granted as prayed, and three (3) subpoenas issued.
Sept. 5	(12)	Order (Murray, J.) that Count Four is severed from Counts One, Two and Three of the Indictment for purposes of trial (c/s 9/5/79 cwc)
Sept. 11	(13)	Appearance of John H. Morris, AFPD, as co-counsel on behalf of defendant.
" "	(14)	Motion of defendant in Limine, Memorandum and Request for Hearing. (2 c/s 9-11-79)
" "	—	Hearing on Motion in Limine of defendant—Oral Opinion rendered by the Court, Murray, J.
" "	(15)	Order (Murray, J.) that Motion in Limine of defendant is "GRANTED" in part and "DENIED" in part. (See Paper No. 14)
" "	(16)	Requested Questions (11) of United States on Voir Dire.

DATE			PROCEEDINGS
1979			
"	"	(17)	Requested Questions (20) of defendant on Voir Dire.
"	"	(18)	Requested Jury Instructions (14) of United States.
"	"	(19)	Requested Jury Instructions (18) of defendant.
"	"	—	Jury sworn and examined on Voir Dire.
"	"	—	Jury empannelled and sworn before (Murray, J.) as to Counts 1, 2 and 3 ONLY.
"	"	(20)	Motion of defendant for Judgment of Acquittal on Counts (1) and (2) of the Indictment and Memorandum in Support thereof. (c/s)
"	"	(21)	Motion of defendant for Judgment of Acquittal on Count (3) of the Indictment, Exhibit A and B and Memorandum. (c/s)
"	"	(22)	SECOND Motion of defendant for Judgment of Acquittal on Count (3) of the Indictment and Memorandum. (c/s)
"	"	—	Hearing on Motion of defendant for Judgment of Acquittal on Counts 1, 2 and 3 of the Indictment filed at conclusion of Governments case-in-chief-decision to be rendered tomorrow.
"	"	—	Not Concluded.
Sept. 12		—	Trial continued.
"	"	(23)	Response of United States to Motion of defendant for Judgment of Acquittal on Count III. (c/s)

DATE			PROCEEDINGS
1979			
"	"	(24)	Supplemental Requested Jury Instructions (14) of defendant.
"	"	—	Oral Opinion rendered by the Court "DENYING" Motions of defendant for Judgment of Acquittal on Counts 1, 2 and 3 of the Indictment, filed at conclusion of Government's case-in-chief.
"	"	(25)	Order (Murray, J.) that Motion of defendant for Judgment of Acquittal on Counts (1) and (2) of the Indictment is "DENIED." (See Paper No. 20)
"	"	(26)	Order (Murray, J.) that Motion of defendant for Judgment of Acquittal on Count (3) of the Indictment is "DENIED." (See Paper No. 21)
"	"	(27)	Order (Murray, J.) that SECOND Motion of defendant for Judgment of Acquittal on Count (3) of the Indictment is "DENIED." (See Paper No. 22)
"	"	—	Argument of Counsel.
"	"	—	Court's Charge to the Jury.
"	"	—	Bailiff sworn (Charles Groce)
"	"	—	*VERDICT*: "GUILTY" as to Counts 1 and 3 and "NOT GUILTY" as to Count 2.
"	"	—	Imposition of sentence suspended as to Counts 1 and 3 pending pre-sentence report.
"	"	—	Conditions of release set by Magis. Rosenberg are hereby "MAINTAINED.

DATE		PROCEEDINGS
1979		
" 19	(28)	Motion of defendant to Dismiss Count One, or for Alternative Relief and Memorandum. (2 c/s 9-20-79)
Oct. 9	(29)	Motion of United States for Extension of Time to Motion of defendant to Dismiss Count One or for Alternative Relief. (c/s 10-9-79)
Oct. 10	(30)	Order (Murray, J.) EXTENDING time until October 15, 1979 for United States to respond to Motion of defendant to Dismiss Count One or for Alternative Relief. (c/m 10-10-79—ak)
" 23	(31)	Memorandum of United States in response to motion of defendant to dismiss count one of the Indictment and Affidavit. (c/s 10/23/79)
Nov. 1	(32)	Reply of defendant to Memorandum of United States in response to motion of defendant to dismiss count one of the Indictment, Exhibit A and Request for Hearing. (c/s 11/1/79)
" 7	—	Hearing on motion of defendant to dismiss count one of the Indictment.
" "	—	Oral Opinion rendered "DENYING" motion of defendant to dismiss count one of the Indictment—AUSA to submit order.
" 9	(33)	Order (Murray, J.), "DENYING" motion of defendant to dismiss count one of the Indictment, as therein set forth. (c/m 11/13/79 par)
Dec. 12	(34)	JUDGMENT: The defendant is hereby committed to the custody of the Attorney General or his authorized rep-

DATE		PROCEEDINGS
1979		
		resentative for imprisonment for a period of five (5) years as to Count No. 1 and for a period of one (1) year as to Count No. 3. Said terms of imprisonment to run consecutively, making a total term of imprisonment of six (6) years. Terms of imprisonment imposed as to each of Counts Nos. 1 and 3 are to run consecutively, to any sentence imposed by any other Court. Upon a Jury Verdict of "Not Guilty" as to Count No. 2, a Judgment of Acquittal was entered by the Court, as to said count. Upon Order of the Court, Count No. 4 of the Indictment was severed for purposes of trial, Order Murray, J.) dated November 26, 1979.
Dec. 12	(35)	Notice of Appeal of Defendant (c/m 12/26/79) (Received 11/26/79).
" "	(36)	Order (Murray, J.) "Directing" the Official Court Reporter to prepare transcript of proceedings, as there in more particularly set forth.
1980		
Jan. 31	(37)	Motion and Order (Murray, J.) that the U.S. Marshal transport the defendant to the Bacon Funeral Home, to view his mother's remains, and to be returned to Baltimore, City Jail. (c/s 1/31/80 j.b.)
Mar. 4	(38)	Order of United States Attorney, dismissing Count 4 of the Indictment as to Defendant and leave of Court (Murray, J.) thereon.

DATE		PROCEEDINGS
" 31	(39)	Transcripts of Proceedings before the Court (Murray, J.) taken on September 11 & 12, 1979 and November 7 & 26, 1979. (FOUR VOLUMES).
Apr. 1	(40)	Exhibit list.
" "	—	Record on Appeal transmitted to Clerk, U.S. Court of Appeals, for the Fourth Circuit, Richmond, Virginia (Volume I through VI).

[CRIMINAL COMPLAINT]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Magistrate's Docket No. 3/76

Case No. 100M

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

COMPLAINT FOR VIOLATION OF

U.S.C. Title 18 36 CFR 50.31 (2 counts)
50.32

Section 7(3), 13 113D

Md. Art. 66½, Sec. 11-904, 10-102, 10-104

BEFORE GEORGE E. BURGESS, Hyattsville, Maryland

The undersigned complainant being duly sworn states:

That on or about February 2, 1976, at 1854 hours at S/B Baltimore-Washington Parkway at Maryland Route #450, an area within the special territorial jurisdiction of the United States in the District of Maryland LEARLEY REED GOODWIN did unlawfully operate a motor vehicle, to wit: brown Buick bearing D.C. registration D-1802 in excess of the posted speed limit 60 in a 50, did unlawfully assault Officer Morrissette by striking, beating or wounding with said vehicle, did unlawfully fail to give aid, information and I.D. at the scene of a personal injury accident, did unlawfully flee to elude a Police Officer, did unlawfully operate said vehicle in a reckless manner, and did unlawfully exceed the posted speed limit, to wit: 95+ in a 45 zone.

And the complainant states that this complaint is based on investigation and observation of Officer Morrissette, United States Park Police.

See attached reports referenced hereto made a part hereof.

And the complaint further states that he believes that

are material witnesses in relation to this charge.

/s/ James G. Morrissette
Officer
United States Park Police

Sworn to before me, and subscribed in my presence, February 3, 1976.

/s/ George Burgess
United States Magistrate

[INDICTMENT]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM-79-0298

(Forcibly Assaulting a Federal Officer, 18 U.S.C. §§ 111 and 1114; Assault Within the Maritime and Territorial Jurisdiction, 18 U.S.C. § 113(c); Fleeing to Elude a Police Officer, 18 U.S.C. §§ 7, 13 and Annotated Code of Maryland, Article 66½ § 11-904, (Transportation Article § 21-904); Failure to Appear, 18 U.S.C. § 3150

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

INDICTMENT

The Grand Jury for the District of Maryland charges that:

1. On or about February 2, 1976, in the State and District of Maryland,

LEARLEY REED GOODWIN

did willfully and forcibly assault, resist, oppose, impede, intimidate and interfere with James Morrissette, an officer of the United States Park Police, National Park Service, United States Department of the Interior, while the said officer was engaged in the performance of his official duties.

2. On or about February 2, 1976, in the State and District of Maryland,

LEARLEY REED GOODWIN

did use a deadly and dangerous weapon, that is, an automobile, in the commission of the offense charged in paragraph one of this count.

18 U.S.C. §§ 111 and 1114

COUNT II

And the Grand Jury for the District of Maryland further charges that:

On or about February 2, 1976, on the Baltimore-Washington Parkway, within the special territorial jurisdiction of the United States,

LEARLEY REED GOODWIN

did assault James Morrissette with a dangerous weapon, that is an automobile, without just cause or excuse and with intent to do bodily harm to James Morrissette.

18 U.S.C. § 113(c)

COUNT III

And the Grand Jury for the District of Maryland further charges that:

On or about February 2, 1976, on the Baltimore-Washington Parkway, within the special territorial jurisdiction of the United States,

LEARLEY REED GOODWIN

did, by willfully failing to stop his vehicle, and by other means, attempt to elude James Morrissette, an officer of the United States Park Police, National Park Service, United States Department of the Interior, who was then in a vehicle appropriately marked as an official police vehicle and who gave LEARLEY REED GOODWIN a visual and audible signal to stop his vehicle.

18 U.S.C. §§ 7 and 13

Annotated Code of Maryland Article 66½, § 11-904 (Transportation Article § 21-904)

COUNT IV

And the Grand Jury for the District of Maryland further charges that:

On or about April 29, 1976, in the State and District of Maryland,

LEARLEY REED GOODWIN

having been previously charged in a complaint with (1) unlawfully assaulting officer James Morrissette by striking, beating or wounding with a vehicle in violation of 18 U.S.C. § 113(d), a misdemeanor; (2) unlawfully failing to give aid, information and identification at the scene of a personal injury accident in violation of 18 U.S.C. §§ 7 and 13 and Annotated Code of Maryland, Article 66½ §§ 10-102 and 10-104 (Transportation Article, §§ 20-102 and 20-104), petty offenses; (3) unlawfully fleeing to elude a police officer in violation of 18 U.S.C. §§ 7 and 13 and Annotated Code of Maryland, §§ 11-904 (Transportation Article 21-904), a misdemeanor; (4) unlawfully operating a vehicle in a reckless manner in violation of 36 CFR § 50.32, a petty offense; (5) and unlawfully exceeding the posted speed limits in violation of 36 CFR § 50.31 (two counts), petty offenses, having been released pursuant to the provisions of the Bail Reform Act of 1966, 18 U.S.C. § 3146(a) for appearance before the Honorable George Burgess, United States Magistrate for the District of Maryland in connection with the said charges, and having been required to appear before the said magistrate on April 29, 1976 for trial on the said charges, knowingly and willfully did unlawfully fail to appear as required before the aforesaid magistrate.

/s/ Russell T. Baker, Jr.
RUSSELL T. BAKER, JR.
United States Attorney

18 U.S.C. § 3150

A TRUE BILL:

Foreman

[MOTION TO DISMISS
COUNT I OF THE INDICTMENT]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM-79-0298

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

MOTION TO DISMISS COUNT ONE, OR FOR ALTERNATIVE RELIEF

The defendant, Learley Reed Goodwin, by his attorneys, Charles G. Bernstein, Federal Public Defender for the District of Maryland, Paul W. Spence, and John H. Morris, Assistant Federal Public Defenders, respectfully moves this Honorable Court to dismiss Count One of the pending Indictment, or for alternative relief as deemed appropriate, and for reasons states the following:

1. On February 2, 1976, the defendant was cited in violation notices filed in the United States District Court for the District of Maryland, at Hyattsville, with the following offenses: (1) unlawfully failing to give aid, information and identification at the scene of a personal injury accident, in violation of 18 U.S.C. §§ 7 and 13, and Ann. Code of Md., Trans. Art., §§ 20-102, 20-104; (2) assault by striking, beating or wounding, in volation of 18 U.S.C. 113(d); (3) fleeing or eluding a police officer, in violation of 18 U.S.C. §§ 7 and 13, and Ann. Code of Md., Trans. Art., § 21-904; (4) reckless driving, in violation of 36 C.F.R. § 50.32; (5) exceeding the posted speed limits, in violation of 36 C.F.R. § 50.31 (two counts)

2. On February 3, 1976, a Complaint was filed alleging the violations of the aforementioned offenses. On March 30, 1976, the defendant appeared before the Honorable George E. Burgess for a preliminary hearing on the charge of fleeing or eluding. (The remaining charges, as petty offenses, did not entitle the defendant to a preliminary hearing). The Magistrate found probable cause, and trial on the aforementioned charges was scheduled for April 29, 1976, before Magistrate Burgess.

3. Due to the defendant's absence from the jurisdiction, the proceedings were held in abeyance until May 24, 1979. At this time, the defendant was transported to the United States District Court at Hyattsville for trial on the aforementioned complaint, plus a further charge of failure to appear, in violation of 18 U.S.C. § 3150. On said date, the defendant refused to consent to be tried by the United States Magistrate and requested a jury trial. This matter was then transferred to the United States District Court for the District of Maryland, at Baltimore.

4. On July 3, 1979, the United States Attorney for the District of Maryland sought and obtained from the Grand Jury an indictment charging the defendant with fleeing or eluding and failure to appear, as before, as well as the additional charges of assault upon a federal officer, in violation of 18 U.S.C. § 111, and assault with a dangerous weapon within the special territorial jurisdiction of the United States, in violation of 18 U.S.C. § 113(c).

5. On September 12, 1979, a jury found the defendant guilty of assault upon a federal officer (Count One) and acquitted on the charges of assault with a dangerous weapon within the federal jurisdiction (Count Two).

6. The defendant submits that the indictment on the felony charges violated the Due Process Clause of the Fifth Amendment since he is entitled to pursue his statutory right to refuse to consent to be tried before the United States Magistrate, and his constitutional right to

a jury trial, without the apprehension or appearance that the Government will retaliate by proceeding on more serious charges than had been initially contemplated, thus exposing him to a significantly greater period of incarceration. *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); *United States* v. *Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976).

In support of the aforegoing Motion, the Court is respectfully referred to the accompanying Memorandum.

WHEREFORE, the defendant respectfully moves this Honorable Court to dismiss Count One of the pending Indictment, and for such other or further relief as may be deemed appropriate.

Respectfully submitted,

/s/ Charles G. Bernstein
CHARLES G. BERNSTEIN,
Federal Public Defender

/s/ Paul W. Spence
PAUL W. SPENCE,
Assistant Federal Public Defender

/s/ John H. Morris
JOHN H. MORRIS,
Assistant Federal Public Defender
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[MEMORANDUM IN SUPPORT OF MOTION TO DISMISS]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM-79-0298

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, OR FOR ALTERNATIVE RELIEF

In the aforegoing Motion, the defendant seeks the dismissal of Count One of the Indictment on the ground that the increase in the severity of charges, as accomplished by the felony Indictment of July 3, 1979, violated his constitutional right to due process under the Fifth Amendment.

At the outset, it must be noted that the defendant does not assert actual vindictiveness on the part of the Government; however, "the accused need not prove he was an actual victim of retaliation". *United States* v. *Johnson*, 537 F.2d 1170, 1173 (4th Cir. 1976); *see also Blackledge* v. *Perry*, 417 U.S. 21, 28 (1974); *North Carolina* v. *Pearce*, 395 U.S. 711, 725 (1969).

In *North Carolina* v. *Pearce*, *supra*, the Supreme Court held that after the successful challenge of a conviction on appeal, an accused may not be subjected to a harsher sentence upon retrial and reconviction, absent identifiable conduct occurring after the original sentencing proceeding. Noting that imposition of a heavier sentence upon a reconvicted defendant for the express purpose of penalizing the defendant for having successfully challenged his conviction would be a flagrant violation of Fourteenth Amendment due process, the Court stated that "due process. . . requires that a defendant be freed of appre-

hension of such a retaliatory motivation on the part of the sentencing judge." *Id.* at 725.

In *Blackledge* v. *Perry*, *supra*, the *Pearce* rationale was extended to protect the accused against the fear of prosecutorial vindictiveness. In *Blackledge*, the defendant exercised his statutory right to a trial *de novo* following a misdemeanor conviction in the lower court. The prosecutor then obtained a felony indictment based on the identical conduct upon which the misdemeanor charge was brought. Although there was no indication of bad faith or malice on the part of the Government, the Court held the subsequent felony charge constitutionally impermissible:

> A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Id. at 28. The upshot of *Pearce* and *Blackledge* is that due process mandates a freedom from even the apprehension of retaliation for the exercise of stautory rights. Since this prophylactic rule applies to the exercise of a statutory right that has due process implications, *see, e.g. Blackledge* v. *Perry*, *supra* (right to a trial de novo); *North Carolina* v. *Pearce*, *supra* (right to appeal); and *United States* v. *DeMarco*, 550 F.2d 1224 (9th Cir. 1977) (18 U.S.C. § 3237(b) venue right), it necessarily applies to the exercise of the Sixth Amendment right to a jury trial. *See United States* v. *Andrews*, 444 F. Supp. 1238, 1242 (E.D. Mich. 1978) ("For a Constitutional right it is even more essential to apply the prophylactic rule enunciated in *Blackledge* and *Pearce*").

In the instant matter, the defendant initially appeared before the Honorable George E. Burgess, United States District Court for the District of Maryland, at Hyattsville, on several misdemeanor charges. A preliminary

hearing was held on March 30, 1976, on one of those charges, to wit, fleeing or eluding a police officer. Due to the defendant's absence from the jurisdiction (which gave rise to an additional charge of failure to appear, the proceedings in this case were held in abeyance until May 24, 1979, when the defendant was brought before Magistrate Burgess for trial on the original misdemeanor charges, as well as the alleged failure to appear. At this time, the defendant refused to consent to be tried by the United States Magistrate, and requested a jury trial. Subsequent to the transfer of the case to the United States District Court for the District of Maryland, at Baltimore, the Government sought and obtained a felony indictment charging violations of 18 U.S.C. § 111 (assaulting a federal officer) and 18 U.S.C. § 113(c) (assault within federal jurisdiction), as well as the original misdemeanor charges of fleeing or eluding, and failure to appear.[1] It is clear that the Government could have initially proceeded on the felony charges. Instead, it elected to charge and try the defendant before the United States Magistrate on various misdemeanors, and only proceeded on the felony counts subsequent to the defendant's refusal to consent to be tried before the Magistrate, and request for a jury trial. In a decision similar to the case at bar, *United States* v. *Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976), the court found that "[w]hen the appellant . . . refused to sign the waiver form, the ensuing increase in the severity of the charges against him created a sufficient appearance of vindictiveness to bring the principles of *Pearce* and *Blackledge* into application." *Id.* at 1369. In reversing the conviction and remanding for dismissal of the indictment, the court further stated:

---

[1] The maximum penalty allowable for the various misdemeanors, assuming conviction and consecutive sentences, is four years and two months. However, the defendant is exposed to a potential term of incarceration of fifteen years under the felony counts of the Indictment.

> Therefore, in the present case appellant was entitled to exercise his right to be tried by a District Judge without fear that the prosecutor might retaliate by substituting a more serious charge for the misdemeanor charged in the original complaint.

Id. at 1370. (footnote deleted). *See also United States* v. *Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977); *United States* v. *Andrews*, *supra*; *cf. United States* v. *Sturgill*, 563 F.2d 307 (6th Cir. 1977).

Regardless of the actual motivation of the Government in bringing the felony charges in this case, the appearance of retaliation exists where, as here, those charges follow the defendant's failure to consent to be tried before the United States Magistrate, and request for a jury trial, and there is no indication that the felony charges would have been brought had the case proceeded before the Magistrate. The aforegoing principles of law demonstrate that the mere apprehension of vindictiveness, combined with a significantly increased potential period of incarceration, suffices to deprive the accused of due process of law under the Fifth Amendment.

Respectfully submitted,

/s/ Charles G. Bernstein
CHARLES G. BERNSTEIN,
Federal Public Defender

/s/ Paul W. Spence
PAUL W. SPENCE,
Assistant Federal Public Defender

s/ John H. Morris
JOHN H. MORRIS,
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 19th day of September, 1979, a copy of the aforegoing Motion to Dismiss or For Alternative Relief and Memorandum in support of said Motion was mailed to Edward M. Norton, Jr., Esquire, Assistant United States Attorney, 8th Floor, United States Courthouse, West Lombard Street, Baltimore, Maryland 21201.

/s/ Paul W. Spence
PAUL W. SPENCE,
Assistant Federal Public Defender
1012 Mercantile Bank &
Trust Bldg.
Two Hopkins Plaza
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[DEFENDANT'S REQUEST FOR HEARING]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. HM-79-0298

UNITED STATES OF AMERICA

v.

LEARLEY REED GOODWIN

REQUEST FOR HEARING

The defendant, Learley Reed Goodwin, by his attorneys, Charles G. Bernstein, Federal Public Defender for the District of Maryland, and Paul W. Spence, Assistant Federal Public Defender, pursuant to Rule 6 of the Local Rules of the United States District Court for the District of Maryland, respectfully requests this Honorable Court to grant a hearing on the defendant's Motion to Dismiss Count One, or for Alternative Relief.

Respectfully submitted,

/s/ Charles G. Bernstein
CHARLES G. BERNSTEIN,
Federal Public Defender

/s/ Paul W. Spence
PAUL W. SPENCE,
Assistant Federal Public Defender
1012 Mercantile Bank &
Trust Bldg.
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Baltimore, Maryland 21201
(301) 962-3962 (FTS) 922-3962

[NOVEMBER 7, 1979 PROCEEDINGS
BEFORE THE DISTRICT COURT
AND STIPULATIONS OF FACT]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No. HM-79-0298
Criminal Action

UNITED STATES OF AMERICA

v

LEARLEY REED GOODWIN

Baltimore, Maryland
November 7, 1979

The above-entitled case came on for Hearing on Paper No. 28, Motion of Defendant to Dismiss Count One of the Indictment before His Honor, Herbert F. Murray, at 4:00 p.m.

APPEARANCES

For the Government:

Edward M. Norton, Jr.

For the Defendant:

Paul W. Spence

Reported by: S. M.Lee Schap
Official Court Reporter

* * * *

[178] MR. SPENCE: In this regard, Your Honor, there has been an agreement between Mr. Norton and myself that there will be no testimony, that the legal arguments will rest upon motions filed and the affidavits filed and also several additional facts.

I believe at this point it might be appropriate to read into the record the facts we agreed upon to be considered in addition to the motion for severance, if that is all right with Your Honor.

THE COURT: Yes, I would like to know what they are.

MR. SPENCE: You Honor, Mr. Norton will briefly read into the record the facts we agreed upon and I will continue with my argument after that, if that is all right with Your Honor.

THE COURT: Yes.

[179] MR. SPENCE: Thank you.

MR. NORTON: Yes, Your Honor. As you will remember, we have agreed that on May 24th of this year, 1979, Mr. Goodwin was brought to the United States District Court in Hyattsville to stand trial on charges that are set forth in a complaint which was originally filed on February 3rd, 1976, and also on a charge of failure to appear on a complaint which was filed on April 29th, 1976. He refused to consent to trial by Magistrate and requested a trial by jury.

On that date, on May 24th, 1979, when he appeared in Hyattsville for trial there was present in Magistrate Burgess' Court, a Mrs. Blanche Bruce. Mrs. Bruce was on date and still is a trial attorney with the Anti-trust Division of the Department of Justice in Washington. She was in Magistrate Burgess' Court on what her papers say is a special detail for two weeks to the United States District Court in Maryland and she is charged with prosecuting petty offenses and misdemeanors for the Magistrate on the basis of complaints filed by law enforcement officers. If she had been called to testify at this hearing, she would state that on May 24th, 1979, although she does not specifically remember doing so, she is sure that she read the incident report filed by United States Park Police Officer Morrissette and that she talked with Officer Morrissette about the offense which had [180] occured more than three years earlier

on February 2nd, 1976. She would testify that she was aware of the underlying facts of that incident or the basic facts of that incident and specifically she would state that she knew that Officer Morrissette had stopped Mr. Goodwin for speeding. After Officer Morrissette stopped Mr. Goodwin, he fled the scene hitting Officer Morrissette with the car and she was also aware that he had failed to appear for trial in April of 1976.

Mrs. Bruce and Mr. Goodwin's attorney, on May 24th, of this year—an individual named Mr. Eugene Zoglio—and that is spelled Z-O-G-L-I-O—both would testify that Mr. Zoglio on that date, May 24th, 1979, approached Mrs. Bruce and asked if the Government would consider a plea. Mrs. Bruce responded in the affirmative. Mr. Zoglia and Mrs. Bruce had some discussions about a plea in which some of the petty offenses and misdemeanors would be dropped and Mr. Goodwin would plead guilty to others. Mr. Zoglio went to his client, Mr. Goodwin, and was told by Mr. Goodwin that he did not want to plea bargain. Mrs. Bruce and Mr. Zoglio would also testify that none of the parties in any way considered the fact that an indictment might or could be sought under 18 USC, Section 111, which is Count One in the indictment at issue here.

THE COURT: Implicit in what you have said, [181] I guess, is the fact that Mrs. Bruce was there to prosecute this particular case. Now, had it gone forward before the Magistrate—

MR. NORTON: I don't want to make it implicit. That is a fact. This is what she was there for. She was on this special detail from the Department of Justice and her purpose for being there is prosecute petty offenses and misdemeanors on the basis of complaints brought by law enforcement officer. That was her job on the day that Mr. Goodwin refused to consent to trial before a Magistrate and exercised his right to trial by jury.

• • • •

SUPREME COURT OF THE UNITED STATES

No. 80-2195

UNITED STATES, PETITIONER

v.

LEARLEY REED GOODWIN

ORDER ALLOWING CERTIORARI

Filed November 30, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 364075 784

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SUPREME COURT, U.S.

NO. 80-2195

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

vs.

LEARLEY REED GOODWIN, RESPONDENT

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Assistant Federal Public Defender

Ann. Code of Md., Trans. Art. §21-904 2

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Rule 20.3, Rules of the Supreme Court of the United States. 5

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TABLE OF AUTHORITIES

Cases	Pages
Blackledge v. Perry, 417 U.S. 21 (1974).	5-10, 12, 13, 15, 16
Bordenkircher v. Hayes, 434 U.S. 357 (1978).	5, 8, 9, 16
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STATUTES AND RULES

18 U.S.C. §7 2

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18 U.S.C. §111 3

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Ann. Code of Md., Trans. Art.§20-102 2

Ann. Code of Md., Trans. Art. §20-104 2

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

vs.

LEARLEY REED GOODWIN, RESPONDENT

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

On January 9, 1981, the United States Court of Appeals for the Fourth Circuit reversed the Respondent's conviction for felonious assault on a federal officer, finding that he was denied due process of law when he was indicted and tried for that offense only after he had exercised his right to a jury trial on the petty offense and misdemeanor charges originally lodged against him for the same conduct. Petitioner now asks this Court to review this decision, citing the exceptional importance of the issue presented by this case. Respondent respectfully suggests that the holding of the court of appeals represents a correct, and unremarkable, application of settled principles of due process to the peculiar facts of this case, and neither departs from established precedent nor interferes with the appropriate exercise of prosecutorial discretion.

STATEMENT

1. On February 2, 1976, the Respondent was cited in violation notices filed in the United States District Court for the District of Maryland, at Hyattsville, Maryland, with the following offenses: (1) unlawfully failing to give aid,

information and identification at the scene of a personal injury accident, in violation of 18 U.S.C. §§7 and 13, and Annotated Code of Maryland, Transportation Article, §§20-102, 20-104; (2) assault by striking, beating or wounding, in violation of 18 U.S.C., §113(d); (3) fleeing or eluding a police officer, in violation of 18 U.S.C., §§7 and 13, and Ann. Code of Md., Trans. Art., §21-904; (4) reckless driving, in violation of Title 36, Code of Federal Regulations, Section 50.32; (5) exceeding the posted speed limits, in violation of 36 C.F.R. §50.31 (two counts). These violations were based on the Respondent's alleged misconduct on the evening of February 2, 1976. (See Petition for Writ of Certiorari, hereinafter referred to as "Pet.", 2-3).

On February 3, 1976, a complaint was filed alleging the aforementioned violations. On March 30, the Respondent appeared before United States Magistrate George E. Burgess for a preliminary hearing solely on the charge of fleeing or eluding, he not being entitled to such a hearing on the remaining charges which are merely petty offenses. The court found probable cause, and a trial on all the aforementioned charges was scheduled for April 29, 1976, before the Magistrate. Due to the Respondent's absence from the jurisdiction, the proceedings in this matter were held in abeyance until May 24, 1979. On that date, the Respondent was transported to the United States District Court at Hyattsville for trial before the Magistrate on the aforementioned complaint, as well as on the further charge of failure to appear, in violation of 18 U.S.C., §3150.

When the Respondent appeared before Magistrate Burgess for trial on May 24, the prosecution was represented by Ms. Blanche Bruce, a trial attorney with the Anti-trust Division of the Department of Justice in Washington. Ms. Bruce was on "a special detail for two weeks to the United States District Court of Maryland and she [was] charged with prosecuting petty offenses and misdemeanors for the Magistrate on the basis of complaints filed by law enforcement officers." (Joint Appendix in the Court of Appeals, hereinafter referred

to as "C.A. App.", 110). At the time of this proceeding, Ms. Bruce read the incident report filed by United States Park Police Officer Morrissette and discussed the offenses with the officer. Pursuant to her review of the report and conversations with the officer, Ms. Bruce was aware of the underlying facts of the incident of February 2, 1976. (C.A. App. 110-111).

Prior to the Respondent's appearance before the Magistrate, defense counsel approached Ms. Bruce to determine if the prosecution would consider a plea. Although Ms. Bruce expressed some interest in the proposal, plea negotiations did not develop any further since the Respondent indicated an unwillingness to plea bargain. During this abortive attempt to dispose of the case without a trial, there were no discussions concerning possible additional and more serious charges being brought against the Respondent. (C.A. App. 111).

Upon his appearance in court, the Respondent refused to consent to be tried by the United States Magistrate and requested a jury trial. The matter was then transferred to the United States District Court for the District of Maryland, at Baltimore.

Subsequent to the transfer of the case to Baltimore, the United States Attorney for the District of Maryland sought and obtained from the Grand Jury, on July 3, 1979, an Indictment charging the Respondent with fleeing or eluding a police officer and failure to appear, as previously charged, as well as the additional charges of assault upon a federal officer, in violation of 18 U.S.C., §111, and assault with a dangerous weapon within the special territorial jurisdiction of the United States, in violation of 18 U.S.C., §113(c).[1/]

[1/] Relative to the return of the superseding Indictment, see Pet. 4-7.

2. On September 12, 1979, a jury found Respondent guilty of the felonious assault upon a federal officer, and of the misdemeanor charge of fleeing or eluding a police officer. He was acquitted on the charge of assault with a dangerous weapon. The failure to appear charge, which had been severed for purposes of trial, was later dismissed.

3. Subsequent to the jury verdict, the Respondent moved for the dismissal of the felonious assault charge on the grounds that the filing of this charge, after he had refused to consent to be tried by the United States Magistrate, violated his Fifth Amendment right to due process of law. Although the trial court granted relief from the waiver provisions of Rule 12(b) of the Federal Rules of Criminal Procedure, the Respondent's motion was denied.[2/]

4. A divided panel of the court of appeals reversed Respondent's felony conviction. (Pet. App.A, 1a-15a). The court clearly disclaimed any reliance upon the notion that actual vindictiveness motivated the seeking of the felony charges. However, while finding no actual vindictiveness, the majority concluded that the circumstances surrounding the return of the felony indictment subsequent to the Respondent's exercise of his right to a jury trial gave rise to a genuine risk of retaliation. It stated:

> Lest exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retailiation by prohibiting the bringing of more serious charges, once the right was exercised, at least where there is no showing that the charges could not have been brought before defendant made his election for a jury trial.

(Pet. App. A, 6a). Judge Widener dissented, arguing that the procedures followed in this case, which resulted in the

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[2/] See Petition for Writ of Certiorari, Appendix D, hereinafter referred to as "Pet. App. D.", 19a-20a.

increased charges, were sanctioned by this Court's decision in Bordenkircher v. Hayes, 434 U.S. 357 (1978). (Pet. App. A, 14a-15a).

5. A Petition for Rehearing En Banc filed by the Government was denied on April 16, 1981.[3/]

ARGUMENT IN OPPOSITION

1. Petitioner claims that the ruling of the court of appeals is based on a serious misreading of this Court's decisions in Blackledge v. Perry, 417 U.S. 21 (1974), and Bordenkircher v. Hayes, supra, and further, that it conflicts with the decisions of several other courts of appeals. These claims are unfounded.

In North Carolina v. Pearce, 395 U.S. 711 (1969), this Court held that after the successful appeal of a conviction, an accused may not be subjected to a harsher sentence upon retrial and reconviction absent identifiable conduct occurring after the original sentencing proceeding. Noting that imposition of a heavier sentence upon a reconvicted defendant for the express purpose of penalizing him for having successfully challenged his conviction would be a flagrant violation of due process of law, this Court stated "due process... requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." Id. at 725.

[3/] As noted by Petitioner, the Petition for Writ of Certiorari in this case was filed eleven days out of time under Rule 20.1 of the Rules of this Court. Respondent readily acknowledges that no prejudice has been, nor will be, suffered as a result of this untimeliness. Nevertheless, nothing in the Rules suggests that an opposition to a petition for writ of certiorari filed jurisdictionally out of time must be supported by a showing of such prejudice. Therefore, pursuant to Rules 20.3 and 22.3 of the Rules of the Supreme Court of the United States, Respondent respectfully objects to the jurisdiction of this Court to grant the writ of certiorari.

In Blackledge v. Perry, supra, the Pearce rationale was extended to protect the accused from the fear of prosecutorial vindictiveness. In Blackledge, the defendant exercised his statutory right to a trial de novo following a misdemeanor conviction in the lower court. The prosecutor then obtained a felony indictment based on the identical conduct upon which the misdemeanor charge had been brought. Although there was no indication of bad faith or malice on the part of the prosecutor, this Court held the subsequent felony charge constitutionally impermissible. Noting that the "opportunities for vindictiveness" in that context required a rule analogous to that established in Pearce, this Court stated:

> A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Id. at 28.

The legal principle enunciated in Pearce and Blackledge, therefore, is that due process mandates freedom from even the apprehension of retaliation or vindictive punishment for the exercise of statutory rights. This rationale is obviously "not grounded upon the proposition that actual retaliatory motivation must inevitably exist", Blackledge v. Perry, supra, at 28, but rather upon the notion that the apprehen ion of such vindictiveness may unconstitionally deter a defendant's exercise of his statutory or constitional rights, and therefore violate due process.

In United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976), the Fourth Circuit carefully followed the reasoning of Blackledge. In Johnson, the defendant was originally charged in a four-count indictment and pled guilty to two of those counts. However, on appeal, the convictions were

vacated for lack of compliance with Rule 11, Federal Rules of Criminal Procedure, and remanded. The Government then obtained a superseding forty-one count indictment which included the four original charges. The defendant was subsequently tried and convicted on seven counts, one of which was an original charge.

In its application of the Blackledge rationale, the Fourth Circuit clearly set forth the factual predicate for its conclusion that the defendant's prosecution on the increased charges of the superseding indictment denied him due process of law. First, it found that the Government was ready to proceed to trial on the original indictment and that it was aware of all of the facts essential for the superseding indictment before the guilty plea had been entered by the defendant. Only after the defendant had successfully challenged his plea on appeal was the superseding indictment returned. Second, there was no new evidence discovered between the guilty plea and the new indictment which could justify the additional charges. Noting that Blackledge does not require proof of actual retaliation, the Fourth Circuit concluded that the case before it fell within the doctrine established in Pearce and Blackledge, which is designed to protect the accused from the apprehension of vindictiveness, as well as actual retaliation.

The majority's holding in this case is simply a reaffirmation of the Fourth Circuit's previous interpretation of this Court's decisions. Here, the Respondent was brought before the United States Magistrate for trial on misdemeanor and petty offense charges but refused to consent to be tried at that time and elected a jury trial. Subsequent to his election, he was charged in a superseding indictment which contained two felonies, as well as two of the original charges. All of the facts essentia. to the superseding

indictment were known by, or available to, the prosecution before the Respondent appeared for trial on the original charges and elected a trial by jury. Further, no new evidence was discovered by the prosecution nor was there any further misconduct by the Respondent to justify the additional charges. Stated simply, it is clear that the prosecution could have initially proceeded on the felony charges but instead elected to charge and try the respondent before the Magistrate. The majority's conclusion that the Respondent would have been tried before the Magistrate solely on the lesser charges "but for" his election of a jury trial is thus manifestly correct.

2. The Petitioner claims that the majority opinion reflects a misinterpretation of this Court's decision in Bordenkircher v. Hayes, supra. While the Government's reliance upon Bordenkircher in these proceedings has been persistent, it is misplaced. As stated by the court of appeals, and with ample support, "Bordenkircher is easily distinguishable from Blackledge and from the present case." (See generally Pet. App. A., 6a-8a).

Bordenkircher v. Hayes, as Judge Widener in dissent correctly noted, (Pet. App. A., 14a-15a), sanctioned prosecution on higher charges following an expressed threat of retaliation during plea negotiations. It is clear, however, that Bordenkircher holds only that actual retaliatory behavior is permissible in the context of the "give and take" of plea bargaining. Indeed, this Court expressly limited its holding to "the course of conduct engaged in by the prosecutor in this case," id. at 365, and stated that the Court was not dealing with a situation analogous to that presented in the instant matter, that is, "a situation where the prosecutor without notice brought an additional and more serious charge

after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." 434 U.S. at 360.

Bordenkircher neither undermines nor modifies Blackledge or its rationale as interpreted by the Fourth Circuit.[4] Quite simply, the circumstance presented in Bordenkircher is the exception, not the rule, "where a prosecutor acted vindictively, but an independent factor -/the defendant's ability to choose - eliminated any due process problems." United States v. Andrews, 633 F.2d 449, 457 (6th Cir. 1980). The majority opinion fairly responds to the Government's argument in this respect, and Petitioner's reliance upon an alleged misreading of Bordenkircher in characterizing this case as one of exceptional importance is fatuous.

3. Petitioner claims that the panel decision "will impair the government's ability to rebut claims of prosecutorial vindictiveness in an ever increasing number of cases." (Pet. 14). The fact that Petitioner now seeks this Court's review of the decision on this basis manifests a fundamental misapprehension of the majority opinion since nowhere in that opinion is the Government precluded from that opportunity which it desires. Indeed, such proof is expressly invited. (Pet. App. A, 10a).

In Pearce and Blackledge, this Court recognized that

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[4] In the instant matter, the Government has previously argued that Bordenkircher demonstrates that this Court's "fundamental concern was actual, rather than the defendant's perceived prosecutorial retaliation." See Appellee's Brief in court of appeals,11. The majority opinion correctly points out, however, that "the Supreme Court suggests only that a deterrent arising solely from the risk of higher punishment may be permissible while a deterrent arising from the risk of vindictiveness is not." (Pet. App. A, 8a). This conclusion by the Fourth Circuit is buttressed by a referral to Blackledge v. Perry which states in this regard that "the lesson that emerges from Pearce, Colten [v. Ky., 407 U.S. 104 (1972)] and Chaffin [v. Stynchcombe, 412 U.S. 17 (1973)] is that the Due Process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness'." Blackledge v. Perry, 417 U.S. at 27.

apparently retaliatory conduct might be consistent with due process under certain circumstances. For example, under Pearce, a harsher sentence upon retrial and reconviction is permissible if based upon "objective information concerning identifiable conduct... occurring after the time of the original sentencing proceeding." North Carolina v. Pearce, 395 U.S. at 726. Similarly, Blackledge allows a more serious charge to be brought after a defendant invokes his right to a trial de novo if it had been "impossible to proceed on a more serious charge at the outset." Blackledge v. Perry, 417 U.S. at 29, n. 7. The majority opinion in the instant matter does not detract from this basic notion, explicitly recognizing that due process is satisfied when there is a showing that the new charges could not have been brought prior to the defendant's exercise of his statutory or constitutional rights. (Pet. App. A, 6a).

Clearly, there is nothing in the majority opinion that deprives the Government of precisely what it claims is required, that is, an opportunity to present objective evidence demonstrating that the increased charges rested on non-vindictive grounds. Indeed, the majority opinion explicitly ensures such an opportunity. It is the simple fact that the Government possessed such an opportunity but failed to rebut the appearance of vindictiveness presented by the circumstances of this case that mandated the reversal of the Respondent's conviction.

4. Criticizing the alleged failure of the majority opinion to permit rebuttal of the charge of prosecutorial vindictiveness in this case, Petitioner contends that the result reached here by the Fourth Circuit reflects an interpretation of the due process clause in direct conflict with the other circuits. (Pet. 20). Contrary to this assertion, the factual and procedural circumstances presented

by this case permit only one conclusion regardless of the applicable interpretive framework and do not expose significant inconsistencies among the circuits.

Petitioner's reliance upon the approach adopted by the Fifth Circuit is ill-advised. The standard established in Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), and which is representative of the "balancing test" followed by at least the Sixth Circuit, see e.g. United States v. Andrews, supra, weighs the accused's interest in the right to be free from apprehension of governmental retaliation for the exercise of his rights against the prosecution's interest and the exercise of its discretion. In the application of this balancing process, the "subtle but critical distinction between the addition of charges as contrasted with the substitution of charges", United States v. Andrews, 612 F.2d 235, 242 (6th Cir. 1979), rev.'d United States v. Andrews, 633 F.2d 449 (6th Cir. 1980), is controlling. Where more serious charges, based on new and distinct criminal activity, are added, an independent discretionary prosecutorial decision has been made for the first time, and it is enough that the prosecutor prove only the absence of a vindictive motive. In this instance, the prosecution's interest in the proper exercise of its discretion outweighs the countervailing interest of the accused.

However, where a more serious charge is substituted for a lesser one, and that charge is based on the same criminal conduct, the Government's interest in preserving its discretion to initiate charges for distinct criminal acts is not implicated. Having once been satisfied by the initial charge, the interests in the unfettered exercise of prosecutorial discretion is diminished and the courts will only require a showing by the accused of a reasonable fear of retaliation. In effect, therefore, the Fifth Circuit

recognizes, as does the Fourth Circuit, that the per se rule established in Blackledge is valid and to be applied in those situations involving the substitution of charges. See e.g. Jackson v. Walker, 585 F.2d 139, 143 (5th Cir. 1978) (recognizing that Blackledge sets up a per se rule for some situations, but is not unlimited).

In this case, it is clear that the felony charges levied against the defendant were based on the identical conduct which supported the original misdemeanor assault charge, which is to say that the felony charges were substituted for the lesser offenses. It is apparent, therefore, that the application of the rationale advanced by the Fifth Circuit, and other circuit courts, would only confirm the majority opinion's finding of a due process violation under the circumstances presented here. See, e.g., Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979), cert. denied, 100 S.Ct. 3038 (1980); Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979).

Similarly, a comparison of the majority opinion to the Second Circuit's holding in United States v. Ricard, 563 F.2d 45 (2d Cir. 1977), does not reveal any marked conflict. Ricard approved the addition of more serious charges by a successor prosecutor who reviewed the case file and determined to bring further charges. However, this case is distinguishable on a more fundamental basis, that is, the actual decision to proceed on more serious charges was apparently made prior to the defendant's announcement that he was going to trial, thus precluding a finding that the enhancement of charges was motivated by that exercise of procedural right. Id. at 48. 5/

5/ With respect to this issue of whether varying approaches by successive prosecutors is sufficient to rebut charges of vindictiveness, neither United States v. Andrews, 633 F.2d 449 (6th Cir. 1980) nor United States v. Sturgill, 563 F.2d 307 (6th Cir. 1977) provides support for Petitioner's notion that the Fourth Circuit opinion reflects a conflict among the circuits. (See Pet. 17-18, 21). Andrews, at best, recognizes that the inexperience of an attorney deserves consideration, but further states that the mere fact that a prosecutor made a mistake is not, by itself, sufficient to rebut an appearance of vindictiveness. In Sturgill, the court found that the Blackledge rule was inapplicable since the accused was not required to stand trial on more severe charges than originally brought against him. The "rule" as cited by

Petitioner also refers to Ninth Circuit cases for the unremarkable proposition that a decision to bring more serious charges may be justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness. (Pet. 21). As the majority opinion in this case states in considering the positions held by other appellate courts, "[t]o the extent that these cases permit the government to rebut defendant's prima facie showing through objective proof that the increased charges could not have been brought in the first instance, they do not depart from our holding here." (Pet. App. A, 9a). Moreover, it is important to elaborate on Petitioner's brief reference to United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976). (Pet. 22, n.13). In Ruesga-Martinez, the defendant was originally charged with unlawful entry, in violation of 8 U.S.C., §1325, a misdemeanor. Subsequent to his refusal to consent to be tried by a magistrate, he was charged in a two-count indictment with felony violations of 8 U.S.C., §§1325, 1326. The court found that when the defendant exercised his right to be tried by a judge or jury, "the ensuing increase in the severity of the charges against him created a sufficient appearance of vindictiveness to bring the principles of Pearce and Blackledge into application." Id. at 1369. Expressly disclaiming reliance upon the actual motives of the prosecutor, the court reversed the defendant's conviction and remanded for dismissal of the indictment, stating:

> Therefore, in the present case appellant was entitled to exercise his right to be tried by a District Judge without fear that the prosecutor might retaliate by substituting a more serious charge for the misdemeanor charge in the original complaint.

Id. at 1370 (footnote deleted).

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the Petitioner is mere dicta and is, indeed, based on a premise which the court acknowledges has no support in the record.

Therefore, it is manifest that even assuming arguendo that the Fourth Circuit's analytical approach theoretically differs from standards employed by other circuits, the result in this case, under the narrow circumstances presented, would be the same even if determined by those standards. While there may very well be a case which will test the validity of the rationale adopted by the Fourth Circuit in United States v. Johnson, supra, and subsequently followed in the instant matter one that does more than theoretically draw into conflict varying interpretations of the vindictive prosecution doctrine Goodwin is not that case. In light of the peculiar circumstances presented here, the Petitioner's vision of a great tension between the Fourth Circuit and other appellate courts is unfounded.

5. Petitioner further claims that the majority opinion "will prevent prosecuting attorneys from fulfilling their public responsibility to prefer appropriate charges against criminal defendants after a procedural right has been exercised by the defense." (Pet. 14). Building upon its imagined inability to present evidence tending to rebut an appearance of vindictiveness, Petitioner perceives a destructive impact on prosecutorial decision-making in the wake of the majority opinion. Its misgivings are without support. It is precisely because of the Fourth Circuit's concern that the prosecution retain the full ambit of its discretion that its opinion explicitly allows the opportunity to dispel an appearance of vindictiveness. The prosecution is not unreasonably bound to its initial decision where changed circumstances support and legitimatize further prosecution. Increased charges are justifiable under several circumstances, such as the receipt of additional information through ongoing investigation, see, e.g. United States v. Griffin, 617 F.2d 1342, 1348 (9th Cir. 1980); United States v. Jamison, 505

F.2d 407, 417 (D.C. Cir. 1974), or previous legal impossibility, Blackledge v. Perry, supra, 417 U.S. at 29, n.7, and the Government is in no way precluded from presenting such explanation.

Given the fair opportunity for rebuttal which is provided, the Petitioner's fear of a strangulation of prosecutorial discretion as a result of the majority opinion is revealed to be pure fancy. It is only because of the narrow circumstances presented in this case - facts demonstrating no reason why the increased charges could not have been brought originally - that "the conclusion is inescapable that, 'but for' his election of a jury trial, the defendant would have been tried before the magistrate solely on the lesser charges." (Pet.App. A, 10a). Thus, this case presents a unique situation in which the appellate court found a due process violation within the peculiar factual context presented, and whose practical ramifications are as limited as its holding.

6. Contrary to Petitioner's suggestion, the majority decision will not result in final prosecutorial decisions being made by law enforcement officers. While it is true that proceedings in magistrate's courts are instituted upon charges which are submitted by law enforcement officers, it is equally true that representatives of the Department of Justice, whether Assistant United States Attorneys, members of the Judge Advocate General's Office, or as here, a trial attorney from the Department of Justice on "special detail", are available and presumably responsible for fulfilling the prosecutorial function. While the Petitioner refers to dire consequences due to an inability to review the evidence and the charges filed by law enforcement officers, clearly such an opportunity for review exists. The role of the representatives from the Department of Justice can only be assumed to include a proper review of the evidence, a review of the

charges initially set by law enforcement officers, and the conduct of court proceedings on behalf of the Government. If prosecutorial decisions are, in reality, reached and finalized by law enforcement officers, it will only be the result of an abdication of the prosecutorial function by those assigned to carry it out, and not the result of the Fourth Circuit's decision in this matter.

7. In the final analysis, it is clear that the majority decision correctly applies well-established principles of due process to a unique and narrow set of circumstances. It is also evident that the result reached here pursuant to the Fourth Circuit's interpretation of this Court's decision in Blackledge v. Perry would remain unchanged even under those interpretations of the vindictive prosecution doctrine advanced by other circuits. Furthermore, it has been demonstrated that the Petitioner's claimed encroachment upon the exercise of prosecutorial discretion is totally unfounded and, indeed, is based upon a fundamental misunderstanding of the majority opinion.

Petitioner has suggested that this case presents issues of exceptional importance. Respondent respectfully disagrees. Given the facts of this case and the relevant legal principles, it is apparent that this case affords no crucible for the testing of differing approaches to the issue of prosecutorial vindictiveness. Furthermore, it neither unduly nor inappropriately upsets or interferes with the established workings of the criminal justice system, nor does it otherwise represent a case of wide-ranging importance.[6/] Quite simply, the majority

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[6/] Respondent recognizes that claims of prosecutorial vindictiveness are the subject of frequent litigation in the lower courts. Indeed, Petitioner has cataloged recent examples of such claims. (Pet. 12-13, n.6). However, that decisions such as North Carolina v. Pearce, Blackledge v. Perry, and Bordenkircher v. Hayes, generate such litigation is not adequate justification for a further review by this Court where, as here, any genuine conflict among the circuits or general confusion on the issues that exist in the wake of said decisions is not implicated in the lower court's holding.

Further, a review of the cases collected by Petitioner, the majority of which reject claims of prosecutorial vindictiveness, fail to disclose either an unduly expansive or inconsistent interpretation of the vindictive prosecution doctrine.

opinion offers a resolution based on well-settled law to a narrow and peculiar problem, a resolution whose importance to the Respondent is undoubtedly immeasurable but whose implications beyond the confines of the case itself are minimal.

CONCLUSION

For the aforegoing reasons, the Respondent respectfully suggests that the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NO._____

UNITED STATES OF AMERICA, PETITIONER

vs.

LEARLEY REED GOODWIN, RESPONDENT.

_____

_____

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Respondent, Learley Reed Goodwin, pursuant to Rule 46 of the Rules of the Supreme Court of the United States, and 18 U.S.C., §3006A(d)(6), asks leave to file the attached Respondent's Brief in Opposition on the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, without prepayment of fees and costs and to proceed in forma pauperis. Respondent was represented by appointed counsel in the United States District Court for the District of Maryland and on appeal to the United States Court of Appeals for the Fourth Circuit, and has not previously sought leave to proceed in forma pauperis in any court below.

Respectfully submitted,

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FILED
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CLERK

No. 80-2195

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

LEARLEY REED GOODWIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In opposing our petition, respondent does not attempt to rebut our demonstration (Pet. 11-14) that claims of "prosecutorial vindictiveness," asserted after a defendant exercises a procedural right in the pretrial stage of a criminal prosecution, have arisen with ever increasing frequency and have produced an outpouring of lower court rulings dismissing criminal charges contained in superseding indictments and informations. The fact that such claims arise with great frequency, and that their correct and efficient resolution is essential to the effective enforcement of the criminal law, could not seriously be contested. Nor has respondent offered any common-sense explanation why the court of appeals in this case disregarded the express finding of the district court that the government had "adequately dispelled any appearance of vindictiveness" (Pet. App. 22a).

Respondent argues, however, that the decision of the court of appeals should not be further reviewed because there is a way in which it can be reconciled with prior rulings of this Court and other federal circuits. In particular, respondent argues, based largely on district Judge Green's opinion for the panel in *United States* v. *Andrews*, 612 F. 2d 235, 240-245 (1979), vacated, 633 F. 2d 449 (6th Cir. 1980) (en banc), that it was wholly proper for the Fourth Circuit to disregard the district court's finding that the superseding charge in this case was not brought vindictively because the charge was "substituted" for, rather than "added" to, the charges alleged in the original misdemeanor complaint.[1]

The rationale adduced by respondent, however, provides a wholly inadequate basis for deciding the legal issues presented by the petition and fails as well to reconcile the conflicting decisions of the various courts of appeals. It remains clear that other circuits would have upheld respondent's convictions and that the intervention of this Court is necessary to clarify this important and increasingly confused area of the law.

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[1] Under Judge Green's formulation, a "substitution" occurs whenever a new charge increases the potential severity of the punishment to which a defendant is exposed for the same criminal conduct (612 F. 2d at 244). An "addition" occurs whenever more numerous charges are filed based on distinct offenses arising from the same series of events underlying the original charge (*id.* at 245). Under Judge Green's analysis, the filing of a "substituted" charge constitutes a prima facie case of prosecutorial vindictiveness that may only be overcome by showing the existence of intervening circumstances arising subsequent to preferral of the original charge, that first made it possible to file the more serious charge (*id.* at 244). By contrast, if the filing of "added" charges is involved, any allegation of vindictiveness is "subject to rebuttal by the prosecution offering evidence of facts which reasonably explain or justify the action taken and negate any inference of vindictiveness in fact" (*id.* at 245). As noted below, the Sixth Circuit, sitting en banc, rejected Judge Green's analysis.

1. In *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978), this Court reiterated that due process violations lie "not in the possibility that a defendant might be deterred from the exercise of a legal right * * *, but rather in the danger that the State might be retaliating against the accused" by filing more severe or numerous charges after the defendant has exercised a constitutional or statutory right. The dichotomy between "added" and "substituted" charges, suggested by respondent, does nothing to advance the proper analysis of this fundamental issue.

In determining whether there is "a realistic likelihood" (*Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974)) or a "real threat" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 28 (1973)) of "actual vindictiveness" (*id.* at 26), it is of little consequence whether the means chosen by a prosecutor to "punish a pesky defendant" (*Hardwick* v. *Doolittle*, 558 F. 2d 292, 301 (5th Cir. 1977)) entail the addition of more numerous charges or the substitution of a more severe charge. Both charging devices have an equal capacity to "up the ante," and both may be as readily employed by a prosecutor to inflict retribution. As Judge Keith correctly observed in his panel dissent in *Andrews* (612 F. 2d at 256):

> The facts of this case illustrate how tenuous Judge Green's distinctions really are. Because the prosecutor only added a conspiracy count, he allows the government to advance explanations such as inadvertence and neglect to rebut a prima facie case of vindictiveness. Had the prosecutor substituted a more severe charge, Judge Green would bar it. I do not think that this * * * distinction is warranted. * * * In this case, whether the government substituted or added the charge is not very important.

In practical terms, defendants will often subjectively perceive—justifiably or not—that the filing of substituted charges resulted from retaliatory motives. And in the vast

majority of cases the government will be unable to demonstrate that it was "impossible" to file the substituted charges in the first instance when those charges arise out of the same nucleus of operative facts as the original charge. Because of this, application of Judge Green's rule, which rests on the artificial distinction between "added" and "substituted" charges, would lead to wholly arbitrary assessments of prosecutorial vindictiveness in a large number of cases.

By focusing entirely on the defendant's subjective apprehension of vindictiveness when a substituted charge is brought (612 F. 2d at 244), Judge Green would eliminate the requirement that there be an objective and realistic danger of vindictiveness in this kind of case. See *Bordenkircher* v. *Hayes, supra*, 434 U.S. at 363; *Blackledge* v. *Perry, supra*, 417 U.S. at 27; *Chaffin* v. *Stynchcombe, supra*, 412 U.S. at 26, 28; see also the decision of the Sixth Circuit sitting en banc in *United States* v. *Andrews, supra*, 633 F. 2d at 454-455. Moreover, by limiting the acceptable explanation for the substituted charge solely to intervening circumstances, Judge Green's rule would prevent the government from "affirmatively" dispelling any appearance of vindictiveness (*North Carolina* v. *Pearce*, 395 U.S. 711, 726 (1969)) based upon "all the circumstances" in a case (*United States* v. *Griffin*, 617 F. 2d 1342, 1347 (9th Cir. 1980)). In effect, there would be few substituted charges that would ever be sustained under Judge Green's approach. Nothing in this Court's decisions suggests that such an analysis is required by the Due Process Clause.

2. We know of no circuit that applies the rule advocated by respondent. Although the court below has—improperly in our view—adopted a per se rule, it has not done so based on the distinction advanced by respondent. Rather, the Fourth Circuit limits the government's explanation to intervening circumstances whenever "more serious" or

"increased" charges are filed. See Pet. App. 6a, 10a. In the court's words (*id.* at 6a): "the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges * * * where there [was] no showing that the charges could not have been brought before defendant made his election for a jury trial."

The two circuits that have referred to respondent's "substituted/added" charge distinction (the Fifth and the Sixth) have done so only as part of a multi-faceted balancing test that requires attention to all of the facts of record. Neither of these circuits has suggested that the distinction is determinative. Thus, in its en banc decision in *Andrews*, the Sixth Circuit followed a two-step analysis. At the threshold was an inquiry whether, as an objective matter, there existed a realistic likelihood of vindictiveness, based both on the prosecutor's "stake" in deterring the exercise of the legal right and on whether the new charges were "added" or "substituted" (633 F. 2d at 454). The court emphasized, however, that "there is no per se rule here" (*ibid.*). Moreover, even if a weighing of such factors establishes a "realistic likelihood" of vindictiveness, and regardless whether the new charges are "added" or "substituted," the government is afforded broad latitude to "rebut" this finding with "objective, on-the-record explanations" of the kind offered in this case (*id.* at 456).

The Fifth Circuit has adopted a similar test, balancing a defendant's due process interest in asserting a particular right against the prosecutor's interest in bringing increased or more serious charges. See *Jackson* v. *Walker*, 585 F. 2d 139, 144-145 (5th Cir. 1978); *Hardwick* v. *Doolittle*, 558 F. 2d 292, 301 (5th Cir. 1977). Considered in this threshold analysis are both the stage of the proceeding at which the new charges are brought and whether the charges are additions or substitutions (*ibid.*). However, the Fifth Circuit,

like the Sixth but unlike the Fourth Circuit in the instant case, allows broad latitude in rebutting any realistic appearance of vindictiveness: "[a]n increase in the severity or number of charges if done without vindictiveness may be easily explained." *Hardwick* v. *Doolittle, supra*, 558 F. 2d at 301; accord, *Miracle* v. *Estelle*, 595 F. 2d 1269, 1277 & n.14 (5th Cir. 1979).

3. Contrary to the impression conveyed by the brief in opposition, no other circuit would limit the government's explanation for the new charge in this case to a demonstration of facts that were unavailable when the original charges were preferred. As we have shown above, both the Fifth and Sixth Circuits would allow the prosecutor broad latitude in dispelling any appearance of vindictiveness. The Ninth Circuit similarly allows the filing of more serious or additional charges to be justified by "independent reasons"—reasons different from "intervening circumstances." See, *e.g.*, *United States* v. *Robison*, 644 F. 2d 1270, 1272 (9th Cir. 1981).[2] And, in *United States* v. *Anderson*, 514 F. 2d 583, 588 (7th Cir. 1975), and *United States* v. *Ricard*, 563 F. 2d 45, 48 (2d Cir. 1977), the courts of appeals have afforded the government broad latitude to provide nonvindictive explanations for the new charges. There can be little genuine doubt that these courts would accept the explanation offered by the prosecutor in this case, particularly when the

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[2]Some panels of the Ninth Circuit, however, have dismissed criminal charges on expansive "vindictiveness" theories that cannot be squared with the decisions of this Court or with other Ninth Circuit decisions. Those rulings place unwarranted obstacles in the path of prosecutors who find it appropriate to alter charges against the accused after he exercises a procedural right. See, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 646 F. 2d 384 (9th Cir. 1981); *United States* v. *Currie*, No. 80-1835 (9th Cir. Aug. 17, 1981). Due to the serious confusion created by *Currie* and *Hollywood Motor Car Co.*, the government has requested rehearing with a suggestion for rehearing en banc in each of those cases.

district court affirmatively has found a complete absence of vindictiveness (Pet. App. 22a-23a)—a finding that was accepted on appeal (*id.* at 4a).

Of greatest importance, as pointed out in our petition (Pet. 20-21), other courts of appeals would credit the prosecutor's explanation for increased charges based on the inexperience of the original prosecutor and her lack of authority to seek a felony indictment (see Pet. 4-5). Indeed, the other circuits have held that a "successor prosecutor" may take "a different approach to prosecutorial duty" and obtain increased charges without offending the Due Process Clause. See *Jackson* v. *Walker, supra*, 585 F. 2d at 148-149 & n.20; *United States* v. *Ricard, supra*, 563 F. 2d at 48; *Hardwick* v. *Doolittle, supra*, 558 F. 2d at 301; *Miracle* v. *Estelle, supra*, 592 F. 2d at 1277 n.14; *United States* v. *Andrews, supra*, 633 F. 2d at 456.

In sum, the Fourth Circuit has adopted a rigid per se rule for resolving vindictiveness claims that—contrary to respondent's suggestion (Br. in Opp. 14)—cannot be reconciled with the flexible standards adopted by the other circuits. If left undisturbed, this decision will continue to result in the dismissal of indictments and the vacation of convictions in circumstances in which any appearance of vindictiveness on the prosecutor's part has been completely dispelled. That result agrees neither with due process principles nor the decisions of this Court.

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

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No. 80-2195

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

LEARLEY REED GOODWIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the prosecutor's decision to increase charges against respondent may properly be characterized as "vindictive" prosecutorial action in violation of the Due Process Clause merely because it occurred after respondent elected to be tried by jury.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 637 F.2d 250. The order of the court of appeals denying rehearing (Pet. App. 17a) is not reported. The opinion of the district court (Pet. App. 18a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on January 9, 1981. A petition for rehearing was denied on April 16, 1981 (Pet. App. 17a). The petition for a writ of certiorari was filed on June 26, 1981, and was granted on November 30, 1981 (J.A. 27).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article II, Section 3 of the Constitution provides in pertinent part:

> [The President] shall take Care that the Laws be faithfully executed * * *.

2. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, respondent was convicted of forcibly assaulting a federal officer, in violation of 18 U.S.C. 111, and of fleeing from a police officer, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. § 21-904 (1977). He was sentenced to consecutive terms of five years' imprisonment on the assault count and one year's imprisonment on the flight count. On appeal, a divided panel of the Fourth Circuit reversed respondent's felonious assault conviction, finding that the charge had impermissibly been brought after respondent invoked his right to be tried by jury on certain misdemeanor and petty offense charges that previously were filed against him.

1. On the evening of February 2, 1976, the vehicle that respondent was driving was stopped for speeding by U.S. Park Policeman James Morrissette on the Baltimore-Washington Parkway (C.A. App. 91-108).[1] Both respondent and Officer Morrissette got out of their automobiles and walked to the passenger side of respondent's car. After checking respondent's driver's license, Officer Morrissette shined his flashlight into the car and asked respondent to lift the armrest on the front seat of the car. Respondent then entered the car, placed it into gear, and rapidly accelerated. As the car started forward, it "fish-

[1] "C.A. App." refers to the joint appendix in the court of appeals.

tailed," striking Officer Morrissette and knocking him onto the back of the car and then into the highway (*id.* at 100-101). When the officer recovered himself, he returned to his car and, with lights flashing and siren sounding, pursued respondent at speeds reaching 95 miles per hour. Respondent nonetheless eluded the officer in heavy traffic (*id.* at 101-103). The following day, Officer Morrissette filed a complaint in the United States District Court for the District of Maryland at Hyattsville, charging respondent with several misdemeanor and petty offense counts, including the misdemeanor count of "assault by striking" a police officer, in violation of 18 U.S.C. 113(d) (Pet. App. 2a; J.A. 10).[2]

Respondent thereafter was arrested on March 11, 1976, and appeared before the United States Magistrate in Hyattsville for a preliminary hearing. At that hearing, respondent sought to have the charges against him dismissed by testifying that he was in Georgia when the incident on the parkway occurred. The magistrate found probable cause, however, and set the case for trial on April 29, 1976 (Pet. App. 2a-3a). After being released on his own recognizance, respondent fled the jurisdiction. He also failed to appear for trial and remained absent from the jurisdiction for over three years (*ibid.*). Respondent later was found in jail in Alexandria, Virginia, and was returned to Maryland by Virginia state correctional authorities (Pet. App. 25a-27a).

2. Upon his return to Maryland, respondent's case was assigned to Ms. Blanche Bruce, an attorney from the Antitrust Division of the Department of Justice who was temporarily detailed in Hyattsville to try petty crime and

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[2] The other charges contained in the complaint were as follows: two counts of speeding, in violation of 36 C.F.R. 50.31; one count of reckless driving, in violation of 36 C.F.R. 50.32; one count of failing to give aid at the scene of an accident, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. §§ 20-102 and 20-104 (1977); and one count of fleeing from a police officer, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. § 21-904 (1977) (J.A. 10).

misdemeanor cases before the magistrate. Ms. Bruce performed that duty for a two-week period, during which she was authorized to try complaints filed by law enforcement officers before the magistrate (J.A. 25-26). She did not have authority to try felony cases, to seek indictments from the grand jury, or to file informations (*ibid.*; Pet. App. 23a; Nov. 7, 1979 Tr. 196-197).

At a May 24, 1979 hearing before the magistrate, Ms. Bruce was "approached" by respondent's attorney, who "asked if the government would consider a plea" (J.A. 26). Ms. Bruce expressed interest in the proposal, but respondent later advised counsel that he did not wish to plead guilty and desired a trial by jury before the district court (*ibid.*). It is stipulated that, at this point, "none of the parties in any way considered the fact that a [felony] indictment might or could be brought" against respondent (*ibid.*).

As a result of respondent's plea of not guilty and his request for a jury trial, the case was transferred by the magistrate to the district court in Baltimore and was assigned to Assistant United States Attorney Edward Norton. As part of his pretrial preparation, Norton carefully reviewed the file and interviewed Officer Morrissette. He also conducted an independent investigation into respondent's background. His research disclosed that respondent was involved on a continuing basis in serious violent misconduct and drug-related crimes (Pet. App. 25a-31a).

In view of those facts, which were not ascertained by the United States Attorney's Office until after the case was transferred by the magistrate (C.A. App. 62, 63-64; Pet. App. 27a-31a, 22a-23a), Norton obtained a four count indictment on July 3, 1979, charging respondent with one felony count of forcibly assaulting a federal officer, in violation of 18 U.S.C. 111, and three related counts arising out of the same incident (Pet. App. 25a-31a; J.A. 12-14). As previously noted, respondent was convicted after a jury trial on one felony count of forcibly assaulting a federal officer and on one misdemeanor count of fleeing to evade arrest.

3. Following the jury's verdict, respondent moved to dismiss the felonious assault count of the indictment, contending that the charge gave rise to an impermissible "appearance of retaliation" (J.A. 21).[3] Although respondent did "not assert actual vindictiveness on the part of the Government" (*id.* at 18), he claimed that prosecutor Norton's decision to increase charges after he invoked his right to trial by jury generated an "apprehension of retaliation" (*id.* at 19). He further contended that, "[r]egardless of the actual motivation of the Government * * * [an] appearance of retaliation exists" as a result of the increased charges, and that this "suffices to deprive the accused of due process of law" (*id.* at 21).

In response to that motion, prosecutor Norton filed an affidavit (Pet. App. 25a-31a) explaining his decision to seek a felony charge. The affidavit stated that Norton's investigation of respondent disclosed that, after the initial charges were lodged by Officer Morrissette, respondent had fled to California, where he had been imprisoned for violating the laws of that State (*id.* at 26a). Norton also learned that respondent recently had been tried and convicted in Virginia for attempting to shoot a police officer and for possession of over 500 $20 bags of heroin (*id.* at 29a). Officer Morrissette advised Norton that respondent had committed perjury at his preliminary hearing in Hyattsville, prior to his flight from the jurisdiction (*id.* at 27a-28a). Morrissette further informed Norton that respondent was known to the federal Drug Enforcement Administration and the Washington, D.C. police as a major heroin dealer (*id.* at 28a), and was associated with two persons who smuggled heroin from Mexico and distributed it in Florida, Georgia, and Maryland (*ibid.*).

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[3] Despite the fact that respondent's post-trial dismissal motion was untimely under Fed. R. Crim. P. 12(b), (f), the district court found cause for the delay (Pet. App. 19a-20a) and considered the motion on the merits.

The prosecutor then summarized the facts that warranted obtaining a felony indictment as follows (Pet. App. 30a-31a):

> First, I considered Mr. Goodwin's conduct on February 2, 1976 to be a serious violation of law. He had intentionally resisted a United States Park Police officer in the performance of his duties, striking the officer with an automobile, leaving him perhaps seriously injured on the highway, and fleeing through traffic at a high rate of speed, thus endangering the lives of other drivers.
>
> Second, among the documents I received in the Court file from Magistrate Burgess was a copy of Goodwin's FBI record. That record showed Mr. Goodwin's lengthy history of violent crime.
>
> Third, based on my conversations with Officer Morrissette and Assistant [Virginia] Commonwealth[] Attorney Jones, I judged Goodwin's conduct on February 2, 1976 to be related to major narcotics transactions.
>
> Fourth, I believed Mr. Goodwin had committed perjury in his testimony under oath at the preliminary hearing before Magistrate Burgess on March 30, 1976.
>
> Fifth, subsequent to the filing [of] the initial complaint on February 3, 1976, Mr. Goodwin had failed to appear for a trial scheduled for April 29, 1976.
>
> In summary, my decision to seek an indictment charging Mr. Goodwin with two felonies, 18 U.S.C. § 111 and 18 U.S.C. § 113[c] was based upon the totality of the circumstances set forth above and upon my judgment that his conduct on February 2, 1976 involved not merely a traffic incident on the Baltimore-Washington Parkway but also serious violations of federal law committed by a dangerous individual. My decision to seek a grand jury indictment was not motivated in any way by, nor did I ever consider Goodwin's request for a trial by jury in the United States District Court.

4. At respondent's request (J.A. 23), the district court held a hearing on the issue of vindictive prosecution.[4] Following that hearing, the district court found (Pet. App. 22a) that "the prosecutor in this case has adequately dispelled any appearance of retaliatory intent." The court noted that the prosecutor "did not receive all the information relating to the charges against Mr. Goodwin until June 11, 1979" and "did not read the information and decide to seek an indictment until some time thereafter." The court added that "the Assistant U.S. Attorney in this case did not know of the Defendant's prior record until after the Defendant requested a jury trial. Since the prosecutor was not aware of the additional information on which the indictment was based until after the May 24th proceedings before Magistrate Burgess [the proceedings in which respondent requested a trial by jury], it appears far less likely that he was motivated by any vindictiveness" (*id.* at 22a-23a). Finally, the district court rejected respondent's assertion that the indictment should be conclusively presumed to be vindictively motivated simply because it was theoretically possible for the prosecutor to obtain all of the relevant information about respondent's background before respondent exercised his right to trial (*id.* at 23a):

> The Defendant intimates that because the Government had *access* to all the pertinent information prior to May 24, 1979, since a representative of the Antitrust Division of the Department of Justice was appointed for a two-week tour of duty before Magistrate Burgess in the prosecution of misdemeanors and petty offense type cases, that the impermissible appearance of vindictiveness remains. However, the case law does not imply, and the due process clause does not require, that the prosecutor carry such a heavy burden of acquiring all information which is potentially available to him at a given time.

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[4] Respondent and the prosecutor stipulated that the district court should render its decision on the vindictive prosecution issue based on a statement of undisputed facts, affidavits, motion papers, and oral argument. See J.A. 24-25.

5. A divided panel of the court of appeals rejected the district court's assessment of the vindictive prosecution issue and reversed respondent's felony conviction (Pet. App. 1a-15a). The court initially stated that "[o]n this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment" (*id.* at 4a). Although finding no "actual vindictiveness," the majority ruled that there was an appearance of vindictiveness because the filing of the felony charge followed respondent's request for a trial by jury (*id.* at 5a-6a). The court of appeals stated that "the due process clause protects a defendant from both actual vindictiveness and the fear of retaliation for exercising" a procedural right (*id.* at 4a-5a). It added that "the *fear* of prosecutorial vindictiveness, as well as *actual* vindictiveness," has a "chilling effect" on the exercise of procedural rights, and therefore is protected against under the Due Process Clause (*id.* at 5a; emphasis in original). The court cited *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), in support of this conclusion (Pet. App. 4a).

The court of appeals distinguished this Court's decision in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), which held that a prosecutor may threaten a defendant with increased charges during plea negotiations and then may "up the ante" if the defendant insists on his right to stand trial. The court noted that in this case, in contrast to *Bordenkircher*, respondent was not expressly threatened with increased charges if he elected to stand trial. The court reasoned that the absence of a threat indicated that a due process violation could be found to exist here although there was none in *Bordenkircher* (Pet. App. 6a-8a).

Finally, the court ruled that the prosecutor could not rebut the appearance of vindictiveness unless he presented evidence showing that "the increased charges could not have been brought before the defendant exercised his rights" (Pet. App. 10a). The court stated that "[l]est

exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges, * * * at least where there [was] no showing that the charges could not have been brought before defendant made his election for a jury trial" (*id.* at 6a). Thus, in the view of the court of appeals, there is a "*per se* violation of the due process clause" when more serious charges are substituted and there is no "proof by objective evidence that the increased charges could not have been brought in the first instance" (*id.* at 9a). The court expressed disagreement with decisions of other circuits that allow a "more far-reaching inquiry" into the issue of prosecutorial vindictiveness (*id.* at 9a n.1).

Judge Widener dissented (Pet. App. 14a-15a). He concluded that the prosecutor's filing of increased charges in the present case, after plea negotiations broke down, was a fortiori proper under this Court's decision in *Bordenkircher* (*ibid.*; emphasis in original):

> As the majority correctly notes, *Bordenkircher* "held that a prosecutor does not violate due process by threatening to increase charges in the course of plea bargaining and then following up on that threat after plea negotiations break down." * * * Applying *Bordenkircher* to our case, if the government had threatened to prosecute Goodwin for assaulting the officer during the plea negotiations which did take place, and then had indicted Goodwin for that crime when the plea negotiations broke down, such conduct would have been approved under *Bordenkircher*. But because of the lack of a threat by the prosecutor to indict, the majority sets aside the conviction because "the circumstances surrounding the felony indictment [the assault on the officer] give rise to a general risk of retaliation." * * * The court now holds that while an expressed threat of retaliation will not suffice to set aside a conviction because of *Bordenkircher*, merely a general risk of retaliation without the expressed threat will suffice. If we analyze what the prosecutor did in *Bordenkircher*, we see that in that

> case he deliberately threatened the defendant with indictment for an additional offense in order to discourage trial, and to encourage a guilty plea, and the prosecutor expressly so advised the defendant before trial. * * * In our case, there is no intimation that the prosecutor was acting with vindictiveness in seeking the indictment for assaulting the officer, and the majority so finds. * * * Neither did he make any attempt to discourage any exercise of Goodwin's right to trial by jury. Thus, what the majority now adopts is a *per se* rule, the effect of which is that a prosecuting attorney must see to it that formal charges are *initially* filed for the most serious offense of which a defendant may be guilty or else forever forfeit the right to so prosecute him if the defendant contests the prosecution in any way.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The court of appeals believed that it was appropriate to apply in this case the prophylactic rules prescribed in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974). Those cases hold that before the government may increase charges or penalties following a criminal defendant's exercise of a post-conviction right of review, the increased penalty exposure must be justified by a narrowly defined showing of legitimate, non-vindictive motivating factors. In the absence of such a showing, the increase in penalty exposure is conclusively presumed to be the product of impermissible "vindictiveness." Contrary to the conclusion of the court of appeals, however, this Court has never intimated that the special prophylactic rules of *Pearce* and *Perry* apply to an increase in the severity of charges during the pretrial stage of a criminal case.

There is no logical basis for extending *Pearce* and *Perry* beyond their setting to the pretrial stage of a criminal prosecution. Increases in charges at the preliminary phase of criminal cases are both commonplace and appropriate in view of the continuous receipt by prosecutors of relevant information during the course of trial preparation.

Likewise, criminal defendants typically exercise a wide variety of procedural rights throughout the pretrial phase of a criminal case; prosecutors expect defense counsel to do so in an adversary system. In this context, there is no reasonable basis to presume "vindictiveness" simply because the prosecutor modifies charges at a point subsequent in time to the defendant's exercise of some pretrial procedural right.

Moreover, in those few cases in which an enhancement of charges may logically be traced to the defendant's exercise of a legal right, it is almost always permissible for the prosecutor so to respond. In view of "the interest of the State in efficient criminal procedure," the prosecutor may respond to the accused's exercise of a procedural right when the government has a "legitimate interest" in so doing, provided the response cannot be characterized as a "needless or arbitrary burden on the defendant's constitutional rights." *Corbitt* v. *New Jersey*, 439 U.S. 212, 220 n.9, 222-223 (1978). Thus, it is perfectly proper, in the pretrial stage of a criminal case, for the prosecutor to respond to the defendant's exercise of his right to stand trial by obtaining enhanced charges. *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). This serves the valid governmental interest in encouraging the negotiation of guilty pleas in an overburdened criminal justice system.

Since the prosecutor's decision to increase charges before trial is only rarely linked to the defendant's exercise of a procedural right, and since, in those few cases where there is such a link, the prosecutor's actions ordinarily are permissible, a prophylactic rule that presumes improper "vindictiveness" has no logical application at this stage. Beyond this, however, application of a presumption of vindictiveness would impose severe burdens on trial judges, prosecuting attorneys, and criminal defendants as a class, without yielding any significant offsetting benefits. A decade of experience in the federal courts has shown that application of rules facilitating vindictive prosecution claims at the pretrial stage seriously encumbers the already complex process between arrest and trial

with burdensome and time-consuming hearings. Moreover, each such judicial hearing on the motivations for pretrial charging decisions intrudes deeply into the prosecutor's discretion—discretion committed to the Executive Branch by the Constitution. Finally, the inevitable effect of encouraging claims of vindictiveness through presumptions and prophylactic rules is that prosecutors are thereby encouraged to bring the most severe charges possible against defendants at the outset of criminal prosecutions in order to avoid becoming embroiled at a later time in "retaliation" controversies. In short, applying presumptions of vindictiveness in the pretrial context is counter-productive: these rules impose a serious and unnecessary burden on trial judges, prosecutors, and persons who are charged with crimes.

It is manifest in this case that the preferral of more severe charges against respondent was in no way motivated by a desire to retaliate against his request for a jury trial. But even indulging the presumptive hypothesis of the court of appeals that the action was retaliatory, the court of appeals' decision cannot stand in light of this Court's decisions in *Bordenkircher* and *Corbitt*. Those decisions unequivocally recognize that it is permissible for the prosecutor to impose greater charges on persons who exercise their right to stand trial, notwithstanding any chilling effect that such charges may have, because society has a strong interest in maintaining an efficient and manageable criminal justice system.

2. Even if it were appropriate to presume vindictiveness in a narrow category of cases in which charges are increased before trial, there clearly is no occasion for doing so in this case. Prophylactic rules are never applicable unless there is a "real threat of vindictiveness" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 28 (1973)), or a "realistic likelihood of 'vindictiveness'" (*Blackledge* v. *Perry*, *supra*, 417 U.S. at 27). There is no such genuine hazard of vindictiveness here. Respondent has conceded (J.A. 18), and the court of appeals has found (Pet. App. 4a), that there was no "actual vindictiveness." This

alone is fatal to a due process claim. See *Moon* v. *Maryland*, 398 U.S. 319, 320-321 (1970). Moreover, a review of the events that preceded the prosecutor's decision to obtain a superseding indictment plainly demonstrates that there is no realistic likelihood of vindictive or retaliatory motivation.

3. Finally, even if it is assumed arguendo that there was a realistic likelihood of vindictiveness in this case and that the prosecutor must therefore justify his decision to obtain increased charges, the prosecutor more than sustained any burden of explanation that devolves on him in these circumstances. The prosecutor explained in his sworn affidavit, without contradiction, that his charging decision had nothing to do with respondent's decision to demand a jury trial. The prosecutor's decision rested solely on his careful evaluation of the case before trial and his determination, made in light of recently acquired information, that respondent was a dangerous criminal with an extensive record of violent misconduct. In these circumstances, failure to press a felony charge against respondent—a charge fully supported by the evidence—would have been a serious breach of the prosecutor's duty to the public.

ARGUMENT

I. THE SUBSTITUTION OR ADDITION OF INCREASED CHARGES AT THE PRETRIAL STAGE OF A CRIMINAL CASE SHOULD BE PRESUMED TO BE A PROPER EXERCISE OF PROSECUTORIAL DISCRETION, NOT VINDICTIVE ACTION IN VIOLATION OF THE DUE PROCESS CLAUSE

The court of appeals found a violation of the Due Process Clause in this case because the prosecutor increased the level of criminal charges "after defendant elected to be tried by a jury" (Pet. App. 4a). In the view of the court of appeals, an enhancement of charges occurring after the exercise of a procedural right generates a "*fear* of prosecutorial vindictiveness" (*id.* at 5a; emphasis in original). The court believed that *North*

Carolina v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), require dismissal of any increased charges that have the potential to generate such anxiety.

In reaching this conclusion, however, the court of appeals disregarded the special contexts in which *Pearce* and *Perry* arose. Both of those cases involved enhancement of charges or punishment following a defendant's exercise of his right to post-conviction review. In view of the facts presented in those cases, it was reasonable to presume that the response of the prosecutor or trial court had no purpose other than penalizing or retaliating against the exercise of that legal right. In those circumstances, this Court barred the increase in penalty exposure absent a narrowly circumscribed explanation of justifying circumstances.

In the pretrial stage of a criminal prosecution, however, the special prophylactic rules fashioned in *Pearce* and *Perry* have no legitimate application, since there is no basis in logic or experience to presume that the sole or predominant purpose for a modification of charges is the penalization of the exercise of a legal right. At this preliminary stage, the prosecutor ordinarily engages in trial preparation and continuing investigation, which frequently leads to the discovery of new information necessitating an adjustment of charges. At the same time, the accused, who also is engaging in trial preparation, typically exercises a variety of routine procedural rights. In most cases in which it becomes appropriate for the prosecutor to modify the charges, the accused already will have exercised some procedural right. In this pretrial context, we submit, the ordinary presumption should apply that the prosecutor is performing his duties in good faith when charges are increased, rather than indulging a presumption of vindictive or malicious purpose.

As we demonstrate below, the decisions of this Court have applied the special prophylactic rules of *Pearce* and *Perry* only to increases in charges occurring at the post-

conviction stage of criminal prosecutions. And the principles announced by this Court in its six decisions in this area militate strongly against an extension of *Pearce* and *Perry* to the pretrial stage.

A. Vindictiveness Can Be Inferred Only In Those Special Contexts In Which There Is A Substantial Probability That The Penalty Exposure Of The Accused Has Been Increased For The Purpose Of Penalizing The Exercise Of A Legal Right

1. The starting point for analysis of the question presented in this case is the presumptive validity of the discretionary charging decisions of the prosecutor. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); see *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *Oyler* v. *Boles*, 368 U.S. 448, 454-456 (1962); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *United States* v. *Thompson*, 251 U.S. 407, 413-415 (1920). Moreover, "[o]ur legal system has traditionally accorded wide discretion to criminal prosecutors * * *. Prosecutors need not be entirely 'neutral and detached' * * *." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980). "In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." *Ibid.* These principles apply with particular force to federal prosecutors, who are charged by the Constitution and federal statute with the solemn duty to "take Care that the Laws be faithfully executed * * *." United States Constitution, Article II, Section 3; 28 U.S.C. 515-519, 547.

"The charging decision," of course, "is the heart of the prosecution function." ABA Standards for Criminal Justice, *The Prosecution Function* Standard 3-3.9, Commentary (1980). "A prosecutor ordinarily should prosecute if, after full investigation, it is found that a crime has been committed * * *." *Ibid.* And while the prosecutor

usually may rely on police and other agencies for investigation of alleged criminal acts, "the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies." Standard 3-3.1(a). In exercising his or her discretion in light of all relevant information, the prosecutor must "view the whole range of possible charges as a set of tools from which to carefully select the proper instrument to bring the charges warranted by the evidence." Standard 3-3.9, Commentary.

Set against these broad principles are the requirements of the Due Process Clause, as articulated in the decisions of this Court. In only two cases has this Court applied special prophylactic rules to guard against "vindictive" enhancement of charges or penalties faced by criminal defendants. Both cases involved increased penalty exposure after the case had reached the stage of entry of a judgment of conviction. And in both cases, the Court rested its ruling on the clear danger that enhancement in charges or penalties was a direct response by the government to the exercise of a post-conviction right to review, which had no purpose other than penalizing or burdening the exercise of that right.

a. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court reviewed the actions of state trial judges who had enhanced significantly the sentences imposed on convicted defendants after those defendants successfully invoked post-conviction review procedures and obtained reversal of their original convictions. The Court concluded that the Due Process Clause limits the imposition of harsher sentences after conviction upon retrial. In one of the cases before the Court, the conclusion was "inescapable" that the trial judge was "punishing [the defendant] for his having exercised his post-conviction right of review" (*id.* at 726); and in the other case, no "reason or justification" was suggested for the increased sentence "beyond the naked power to impose it" (*ibid.*). In analyzing the enhanced sentences in those cases, the

Court reasoned from the premise that imposing a more severe sentence "for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside" would violate the Due Process Clause (*id.* at 723-724). The Court noted, however, that the "existence of a retaliatory motivation" would be "difficult to prove in any individual case" (*id.* at 725 n.20). In view of the clear hazard that vindictiveness motivated the sentences before it, and the difficulty in obtaining reliable proof on that issue, the Court adopted a special prophylactic rule (*id.* at 726):

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.[5]

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), this Court adopted a prophylactic rule, similar to that fashioned in *Pearce*, to guard against vindictiveness by the prosecutor at the post-conviction stage. In that case, the defendant sought a trial de novo in a state superior court following his initial misdemeanor conviction. The prosecutor responded immediately to the exercise of this post-conviction right by obtaining a felony indictment, which resulted in a sentence after conviction of five to seven

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[5] Justices Black, Harlan, and White concurred in part and dissented in part from the Court's judgment. Justice Black concluded that "the courts are not vested with any general power to prescribe particular devices '[i]n order to assure the absence of such a motivation.' * * * This is pure [judicial] legislation if there ever was legislation" (395 U.S. at 741). Similarly, Justice White concluded that the trial judge should enjoy discretion to impose an increased sentence based on "any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding" (*id.* at 751).

years' imprisonment.[6] The Court concluded that "the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Id.* at 27. The Court reached this conclusion only after finding that there was a "realistic likelihood of 'vindictiveness,'" because the "prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo*." *Ibid.* In this context, the Court ruled that "it was not constitutionally permissible for the State to respond to [the defendant's] invocation of his statutory right to appeal by bringing a more serious charge" (*id.* at 28-29), absent a showing that would dispel the appearance of vindictiveness such as a demonstration "that it was impossible to proceed on the more serious charges at the outset." *Id.* at 29 n.7.

In sum, in *Perry*, as in *Pearce*, the Court was faced with a post-conviction increase in penalty exposure that manifestly was triggered by the exercise of the defendant's right to seek review of his conviction. And there was a genuine hazard—if, indeed, it was not entirely obvious in each case—that the response was motivated solely by a desire to punish the accused for the exercise of that right. As we demonstrate below, this Court has refused to extend the special prophylactic rules of *Pearce* and *Perry* to cases in which it is not evident that the increase in penalty exposure was triggered by the exercise of a procedural right, or in which an increase, even if triggered by the exercise of a procedural right, serves a legitimate purpose apart from penalizing the accused for exercising a procedural right.

b. In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), this Court declined to extend the prophylactic sentencing rule

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[6] The prosecutor obtained the enhanced felony charge, which was based on the same conduct that underlay the original misdemeanor charge, immediately "[a]fter the filing of the notice of appeal, but prior to the respondent's apearance for trial *de novo*." 417 U.S. at 23.

prescribed in *Pearce* to a two-tier prosecution system in which the defendant was first convicted in an inferior court and then appealed to a court of general jurisdiction for a trial de novo. The defendant claimed that imposition of greater punishment for the same charge following his appeal to the court of general jurisdiction was a "vindictive" response to his decision to seek a post-conviction remedy. This Court rejected that contention, concluding that the sentencing system did not present "hazards warranting the restraints called for in *North Carolina* v. *Pearce*" (407 U.S. at 119). While the Court recognized that *Pearce* prohibited the imposition of "a more severe penalty after reconviction * * * as purposeful punishment for having successfully appealed," it did not believe that, in the situation before it, vindictive responses would occur "with sufficient frequency to warrant the imposition of a prophylactic rule" (*id.* at 116). The Court saw no logical basis for adopting a presumption that the court of general jurisdiction, which resentenced the defendant following his trial de novo, would respond to the defendant's request for a trial de novo in a vindictive manner (*id.* at 117).

Similarly, in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), where a second jury imposed a more severe sentence on a defendant upon retrial following reversal of his original conviction, the Court refused to apply the prophylactic rule announced in *Pearce*. The Court concluded that the "hazard of vindictiveness" (*id.* at 25) is not present when a new jury imposes sentence following reconviction. While the Court recognized that a more severe sentence would be impermissible if its "only objective * * * is to discourage the exercise of constitutional rights" (*id.* at 33 n.20), it found that the "potential for such abuse of the sentencing process by the jury is * * * de minimis, in a properly controlled retrial" (*id.* at 26).[7]

[7] In reaching this conclusion, the Court rejected the argument that vindictiveness might result from the actions of the prosecutor at the second trial: "[I]t would be erroneous to infer a vindictive

In view of its conclusion that there was no "real threat of vindictiveness" in the case before it (*id.* at 28), the Court dismissed the suggestion that the risk of an enhancement of penalties after the exercise of a procedural right imposes an improper "chilling effect" on defendants (*id.* at 29-35). The Court noted that the defendant at bar "was not himself 'chilled' in the exercise of his right to appeal * * * and we doubt that the 'chill factor' will often be a deterrent of any significance" (*id.* at 33).

Thus, *Colten* and *Chaffin* establish that the special prophylactic rules of *Pearce* and *Perry* have no application in those situations in which it is not reasonable to presume that an increase in penalties is a direct response to the defendant's exercise of a legal right.

c. This Court's decisions also make it clear that the prophylactic rules of *Pearce* and *Perry* do not apply in cases in which an increase in charges or penalties, even though triggered by the defendant's exercise of a legal right, has a valid purpose and is not intended solely to retaliate against the exercise of that right. Thus, in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), the Court held that it was permissible for the prosecutor to threaten the accused with increased charges if the accused did not plead guilty, and to follow up on that threat when the accused insisted on his right to stand trial. At this pretrial stage of the prosecution in which the prosecutor engaged in "give-and-take negotiation common in plea bargaining" (*id.* at 362), the Court found no element of improper "punishment or retaliation" (*id.* at 363). The Court recognized that the prosecutor has a legitimate interest at the bargaining table in persuading the defendant "to forgo his right to plead not guilty" (*id.* at 364).

Similarly, in *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978), this Court upheld a state statutory scheme that

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motive merely from the severity of the sentence recommended by the prosecutor. Prosecutors often request more than they can reasonably expect to get, knowing that the jury will customarily arrive at some compromise sentence" (*id.* at 27 n.13).

authorized more lenient sentences for defendants who pleaded guilty in homicide cases. The Court reiterated that the government has a "legitimate interest" (*id.* at 222) in encouraging guilty pleas and affirmed the "constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based" (*id.* at 224). Since this differential penalty scheme served "the interest of the State in efficient criminal procedure" (*id.* at 220 n.9) and was not a "needless or arbitrary burden on the [exercise of] constitutional rights" (*id.* at 223), the Court found no occasion for a presumption of malice or vindictiveness (*ibid.*):

> We discern no element of retaliation or vindictiveness against Corbitt for going to trial. There is no suggestion that he was subjected to unwarranted charges. Nor does this record indicate that he was being punished for exercising a constitutional right.

In short, *Bordenkircher* and *Corbitt* establish that even when the state enhances charges against a criminal defendant in response to the exercise of a procedural right, that action is permissible if it serves a valid prosecutorial objective such as encouraging the entry of guilty pleas. The special prophylactic rules of *Pearce* and *Perry* do not apply in such a situation.

2. *a.* Even though this Court has never extended the prophylactic rules of *Pearce* and *Perry* to the pretrial stage of a criminal prosecution, and even though this Court has warned that those rules do not apply unless an increase in penalty exposure is a response to the exercise of a procedural right and serves no valid prosecutorial purpose, defendants in criminal cases have argued with ever increasing frequency that the rules fashioned in *Pearce* and *Perry* govern at the pretrial stage. Throughout the pretrial stage of a criminal case, of course, prosecutors are engaged in trial preparation and often receive new information that affects their view as to the proper charges to be pressed against defendants. Like-

wise, defendants routinely exercise various procedural rights under the Constitution, federal statutes, the Federal Rules of Criminal Procedure, and local district court rules. Defense counsel have had no difficulty in connecting the prosecutor's enhancement of charges against the accused (or the prosecutor's taking of other action contrary to the interests of the accused) with the accused's exercise of some procedural right, and repeatedly have filed pretrial dismissal motions based on claims of "vindictive" prosecution. Moreover, such claims have been readily asserted even though this Court ruled in *Bordenkircher* that the prosecutor may properly respond to the exercise of certain rights, such as the right to stand trial, with enhanced charges to achieve legitimate tactical objectives such as the encouragement of guilty pleas.[8]

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[8] We collect below only a few recent examples of such claims, described in the reported opinions of the courts of appeals. See, *e.g.*, *United States* v. *Currie*, 653 F.2d 1300 (9th Cir. 1981) (claim that a superseding indictment was a vindictive response to a decision to stand trial); *United States* v. *Shaw*, 655 F.2d 168 (9th Cir. 1981) (claim that the prosecutor's motion to set aside a guilty plea was a vindictive response to a defense motion for arrest of judgment); *United States* v. *Hollywood Motor Car Co.*, 646 F.2d 384 (9th Cir. 1981), petition for cert. pending, No. 81-1144 (filed Dec. 17, 1981) (claim that a superseding indictment was a vindictive response to a motion to change venue); *United States* v. *Schiller*, 424 A.2d 51 (D.C. Ct. App. 1980) (claim that increased charges were the result of a defense motion for consolidated trial); *United States* v. *Herrera*, 640 F.2d 958 (9th Cir. 1981) (claim that prosecutor's decision to try defendant on original charges after plea bargaining broke down was vindictive); *United States* v. *Burt*, 619 F.2d 831 (9th Cir. 1980) (claim that reindictment was a vindictive response to the defendant's suppression motion in a prior proceeding); *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir. 1980) (claim that second indictment was a vindictive response to motion to dismiss first indictment); *United States* v. *Rosales-Lopez*, 617 F.2d 1349 (9th Cir. 1980) (claim that superseding indictment was a vindictive response to demand for jury trial); *United States* v. *Shaw*, 615 F.2d 251 (5th Cir. 1980) (claim that a superseding information was a vindictive response to defense request to transfer case to a different magistrate); *United States* v. *Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc) (claim that

The courts of appeals, faced with an outpouring of such claims, have been unable to arrive at even a rough consensus on the proper method of analysis. For example, as the present case shows, the Fourth Circuit applies a "per se" rule (see page 9, *supra*) prohibiting any enhancement of charges after the defendant exercises a procedural right unless the prosecutor shows that it was impossible to lodge those charges at an earlier time. The Ninth Circuit has adopted the view that the prosecutor bears a "heavy burden" to dispel the "mere appearance" of vindictiveness when charges are increased before trial. See, *e.g.*, *United States* v. *Ruesga-Martinez*, 534 F.2d 1367, 1369-1370 (1976). The Fifth Circuit, by contrast, holds that an "increase in the severity or number of charges if done without vindictiveness may be easily explained." See, *e.g.*, *Miracle* v. *Estelle*, 592 F.2d 1269, 1277 n.14 (1979). All of these approaches rest on the premise—erroneous, we

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superseding indictment was a vindictive response to a request for bail); *United States* v. *Gardner*, 611 F.2d 770 (9th Cir. 1980) (claim that second indictment was a vindictive response to defense request for trial and exercise of "right" not to cooperate with the government); *United States* v. *Black*, 609 F.2d 1330 (9th Cir. 1979) (claim that new indictment was a vindictive response to defense motion to vacate guilty plea); *United States* v. *Thomas*, 593 F.2d 615 (5th Cir. 1979) (claim that additional charges were the result of defense motion seeking clarification of the indictment); *Chapman* v. *Estelle*, 593 F.2d 687 (5th Cir. 1979) (claim that prosecutor's refusal to engage in plea bargaining was a vindictive response to defendant's motion to set aside guilty plea); *United States* v. *Stacey*, 571 F.2d 440 (8th Cir. 1978) (claim that indictment was a vindictive response to defendant's effort to obtain return of confiscated evidence); *United States* v. *Groves*, 571 F.2d 450 (9th Cir. 1978) (claim that increased charges were a vindictive response to a dismissal motion under the Speedy Trial Act); *United States* v. *Sturgill*, 563 F.2d 307 (6th Cir. 1977) (claim that second information was a vindictive response to defendant's request to be tried by a judge rather than a magistrate); *Hardwick* v. *Doolittle*, 558 F.2d 292 (5th Cir. 1977) (claim that new charges were a vindictive response to defense efforts to remove case to federal court); *United States* v. *Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977) (claim that increase in charges was a vindictive response to "possible motions" by the defendant).

believe—that the prophylactic rules of *Pearce* and *Perry* should be extended far beyond their original scope and should be applied when charges are modified at the pretrial stage of a criminal prosecution.

b. Several recent cases involving claims of vindictive prosecution have produced more careful examinations of the doctrinal underpinnings of the prophylactic rules of *Pearce* and *Perry*. The justifications for applying those rules in the pretrial phase of a criminal prosecution were recently explored by the Sixth Circuit, sitting en banc, in *United States* v. *Andrews*, 633 F.2d 449 (1980). The majority dealt with the problems created by claims of vindictiveness at the pretrial stage not by establishing a general presumption of vindictiveness, but by prescribing a threshold requirement for defendants seeking to establish a prima facie case (633 F.2d at 454-455) and by affording prosecutors substantial latitude to rebut prima facie showings of vindictiveness (*id.* at 456). The dissenting judges, however, reached the conclusion, supported by the decisions of this Court, that prophylactic rules deriving from *Pearce* and *Perry* do not apply at all at the pretrial stage.

Judge Merritt noted in his dissent in *Andrews* that this Court "has never applied the concept of 'vindictiveness' announced in *Pearce* and *Perry* to a prosecutor's actions during the trial and pretrial stages of a criminal case" (633 F.2d at 457). He also described the severe practical problems created by extending *Pearce* and *Perry* to the pretrial stage (*id.* at 469):

> The concept of prosecutorial "vindictiveness" or the "likelihood of vindictiveness" is theoretically endless and unmanageable unless limited to the post-conviction * * * context. Otherwise, the concept is so elusive that nobody—judge, prosecutor, or defendant—can determine where it starts or stops. The concept also appears inconsistent with the competitive, adversary nature of the pretrial and trial process.
>
> By necessity, the public prosecutor must take hard positions contrary to the liberty interests of the ac-

> cused * * * on an endless variety of procedural, evidentiary, substantive and tactical questions. * * *
>
> Once a defendant has successfully asserted a particular legal right in the course of the criminal process over the prosecutor's objection, is the prosecutor arguably guilty of unconstitutional vindictive conduct, which "chills" the exercise of the legal right asserted, each time the prosecutor thereafter takes a position contrary to the interests of the defendant? If not, why not, and what is the standard of measurement?

Beyond these difficulties, Judge Merritt explained that there are many situations—including the situation before the court in which it was alleged that the prosecutor obtained enhanced charges in retaliation for the successful effort of the defendants to secure release on bail after threatening a government witness—in which it is wholly permissible for the prosecutor to respond to the exercise of a legal right with increased charges to serve a valid prosecutorial objective (633 F.2d at 459-460):

> If the defendant had consented to stay in jail, the prosecutor might not have added a conspiracy count. But the prosecutor believed that the defendants had threatened to harm a government witness. The prosecutor retaliated by opposing bail. Having lost on that issue, the prosecutor probably added the conspiracy count for reasons similar to those that led the government to put the witness under the Federal Protection Act—in order to show the defendants that the government intended to fight harder to protect its witnesses and get a conviction now that the defendants were back on the street. * * * [T]o require, as a general principle, the general absence of "prosecutorial vindictiveness" in the heat of battle is an unworkable goal in our adversary system.

Thus, even adopting the defendants' hypothesis that the prosecutor's actions were taken in response to the request for bail, Judge Merritt found no violation of the Due Process Clause.

Judge Martin joined the views of Judge Merritt, and pointed out that application of prophylactic rules to pretrial increases in charges would burden the judicial system without yielding significant benefits (633 F.2d at 460):

> [O]ur system of government vests the United States Attorney with wide discretion in handling criminal charges. So long as he possesses facts sufficient to convince a Grand Jury that a crime has been committed and that the charged defendant has committed that crime, he may proceed to seek an indictment. Once charged, the prosecutor's responsibility becomes more difficult. Guilt of the charge must be proven beyond a reasonable doubt. * * * To impose an additional hearing upon the District Court each time a superseding indictment is filed does nothing more than further defeat the ends of justice. There are many other ways to harness an overzealous prosecutor.

Judge Kennedy, also dissenting in *Andrews*, emphasized other significant costs involved in applying *Pearce* and *Perry* to increases in charges at the pretrial stage. She observed (*id.* at 461) that a test for prosecutorial retaliation that "too easily lets a defendant challenge prosecutorial conduct will have the undesirable effect of curbing prosecutorial discretion to a significant degree. For example, * * * the prosecutor may be forced to bring every charge he conceivably can against each defendant at the initiation of the proceedings to avoid later becoming embroiled in a 'retaliation' controversy."

Judge Engel agreed with the other dissenting judges in *Andrews* and explained that application of *Pearce* and *Perry* to pretrial charging decisions would encroach significantly on the traditional discretionary functions of the executive branch (*id.* at 465-466):

> The discretion to charge persons accused of crime is the function of the executive branch acting through the prosecutor, historically protected from abuse by

> the interposition of the grand jury. There are undoubtedly many occasions when the exercise of that discretion may subject the executive branch to the danger of appearing vindictive or arbitrary or unjust. For the most part, however, correction should lie in the political process to which the executive is subject. Correction in the area of executive discretion should only rarely be a judicial function.

The latest decision of an appellate court to consider the applicability of *Pearce* and *Perry* to modifications in charges at the pretrial stage of a criminal prosecution is the decision of the New Mexico Supreme Court in *State* v. *Stevens*, 96 N.M. 627, 633 P.2d 1225 (1981). In that case, the court ruled that the prophylactic rules prescribed in *Pearce* and *Perry*, which authorize a presumption of "vindictiveness" when charges are increased after the defendant has succeeded in having his conviction set aside, have no application at the pretrial stage. The court explained the grounds for its ruling as follows (633 P.2d at 1227-1228):

> [W]e note that the U.S. Supreme Court has never applied the vindictiveness notion to a prosecutor's actions in the pretrial and trial stages of a criminal case. *Bordenkircher* was the only case presenting pretrial activity, and there, despite clearly vindictive conduct, the Court declined to apply the doctrine. * * *
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> * * * *
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> At the pretrial stage the prosecutor has not gone through the effort of a trial and therefore has less at stake and less motive to act vindictively. As pointed out by Judge Merritt [dissenting in *United States* v. *Andrews*, *supra*], many actions taken by a prosecutor prior to conviction might appear vindictive yet are required by our system of criminal justice. We do not find at the pretrial stage the type of motivation sufficient to presume vindictiveness. Imposition of a pretrial presumption of vindictiveness would interfere with proper prosecutorial discretion. Pros-

> ecutors would be required to justify actions properly taken as adversaries but which may appear vindictive, adding additional burdens to the criminal justice system. Prosecutors might feel compelled to press the severest charges possible at the outset, to the detriment of defendants.[9]

This, we submit, is a correct construction of this Court's decisions under the Due Process Clause. At the pretrial stage of a criminal prosecution, there is no presumption that a modification of charges manifests "vindictiveness" or "malice" on the part of the prosecutor; nor is the prosecutor required to come forward with narrowly circumscribed explanations to justify an exercise of his charging discretion. The presumption at this stage of a prosecution is that the prosecutor has performed his duty in a lawful manner. That presumption can be displaced only by a clear and convincing demonstration that the prosecutor's actions were intended to retaliate for the exercise of a legal right and served no valid prosecutorial purpose. See generally *Oyler* v. *Boles*, *supra*, 368 U.S. at 456; *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 364; *Gregg* v. *Georgia*, 428 U.S. 153, 224-225 (1976) (White, J., concurring); *United States* v. *Blitstein*, 626 F.2d 774, 782 (10th Cir. 1980).

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[9] The New Mexico Supreme Court further explained that, while prophylactic rules do not apply at the pretrial stage of a criminal prosecution, and thus "a defendant does not have the benefit of a presumption at the pretrial stage," he may nonetheless, in an appropriate case, "present evidence of vindictiveness and request relief from the Court." 633 P.2d at 1228-1229. Accordingly, while the prosecutor's charging decision is presumptively lawful, and the prosecutor is not required to sustain any burden of justification for an increase in charges, the defendant is free to tender evidence to the court to support a claim that enhanced charges are a direct and unjustifiable penalty for the exercise of a procedural right. Of course, only in a rare case would a defendant be able to overcome the presumptive validity of the prosecutor's actions through such a demonstration. See *United States* v. *Andrews*, *supra*, 633 F.2d at 461 (Kennedy, J., dissenting).

B. Application Of The Prophylactic Rules Of *Pearce* and *Perry* To Increases In Charges At The Pretrial Stage Of A Criminal Prosecution Would Yield Only Minimal Benefits While Imposing Serious Burdens On Trial Judges, Prosecutors, And Criminal Defendants As A Class

As we have explained above, the prophylactic rules of *Pearce* and *Perry*, when they properly apply, bar any increase in criminal charges or penalties following the exercise of certain procedural rights unless the government bears the burden of justifying that increase through a narrowly circumscribed explanation of motivating circumstances. Thus, in effect, the prophylactic rules erect a presumption of vindictiveness or malicious purpose that the government must surmount if it seeks to increase the defendant's exposure to criminal penalties. As we demonstrate below, however, there is no logical or empirical basis for adoption of such a presumption when charges are adjusted at the pretrial stage of a criminal case. Moreover, any attempt to apply such a presumption would impose serious burdens not only on trial judges and prosecutors, but also on criminal defendants as a class.

1. *a.* In contrast to the post-trial stage of a criminal case, the pretrial stage is characterized by a salient factor: both the prosecution and the defense are busily and competitively engaged in preparation for trial. This means that, in the absence of a guilty plea, defense counsel ordinarily will exercise a variety of procedural rights and will make motions for continuances, for discovery and production of exculpatory materials, for suppression of evidence, for dismissal or clarification of indictments or informations, for adjustment of bail, for transfer of venue, for severance, for rulings in limine, and the like. Indeed, in almost every situation in which the prosecutor has occasion to consider the need for revised charges, the defendant will already have exercised some pretrial procedural right. Exercise of such procedural rights is

largely routine in nature.[10] Prosecutors expect defense counsel to exercise such rights in an adversarial system. Accordingly, it is not reasonable to suppose that such action by the defense will engender a "vindictive" response by the prosecutor "with sufficient frequency to warrant the imposition of a prophylactic rule" (*Colten* v. *Kentucky*, *supra*, 407 U.S. at 116).

Moreover, when the prosecutor is confronted with these pretrial motions, he has not yet invested the time and resources in a case that are at stake when the case reaches final judgment. And the making of these motions does not threaten to upset a victory obtained after trial or require the prosecutor to "do over" what he thought he "had already done correctly" (*Colten* v. *Kentucky*, *supra*, 407 U.S. at 117), as is true of a successful post-conviction appeal or a demand for trial de novo. In short, the "opportunities for vindictiveness in this situation" are not sufficient "to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case" (*Blackledge* v. *Perry*, *supra*, 417 U.S. at 27). As the New Mexico Supreme Court explained in *State* v. *Stevens*, *supra*, 633 P.2d at 1228: "At the pretrial stage the prosecutor has not gone through the effort of a trial and therefore has less at stake and less motive to act vindictively. * * * We do not find at the pretrial stage the type of motivation sufficient to presume vindictiveness."

Furthermore, at the pretrial stage the prosecutor often engages in supplemental investigation to prepare for trial and receives information relevant to the charges against the accused. As the case nears trial, additional evidence is gathered and witnesses are interviewed; it is also common for a co-defendant to plead guilty, to be-

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[10] "On its face, a request of this nature carries with it much less potential for inviting punitive retaliation by the prosecution than, for example, successfully appealing a conviction or securing a mistrial, both of which exact from the prosecution the effort and expense of a new trial." *United States* v. *Schiller*, *supra*, 424 A.2d at 57.

gin to cooperate, and to provide new information about the acts of those who do not plead guilty. Likewise, it is not unusual for one prosecutor to transfer a case to another, leading to a reevaluation of charges. See, *e.g.*, *United States* v. *Ricard*, 563 F.2d 45, 48 (2d Cir. 1977); *Hardwick* v. *Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977). As the facts in this case show, such a transfer may prompt additional investigation, and this in turn may lead to the discovery of information calling for a modification of charges. In this pretrial context, we submit, it is most unlikely that the prosecutor's adjustment of charges (or his taking of other action contrary to the interests of the accused) will reflect a reaction to the defendant's exercise of a procedural right, rather than a good faith evaluation of the case based on independent considerations. Accordingly, indulgence of a "presumption" of vindictiveness in the pretrial setting would exceed the bounds of reasonable inference.[11]

Finally, in those few cases in which an increase in charges or other action contrary to the interests of the defendant can reasonably be traced to the exercise of a procedural right before trial, it is almost always permissible for the prosecutor to so respond in an adversary context. As noted on pages 20-21, *supra*, the Due Process Clause is not offended by increases in charges or penalties that are not a "needless or arbitrary burden on the defendant's constitutional rights" (*Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 223). The Due Process Clause is not infringed if the prosecutor enhances charges in response to the exercise of a procedural right if he thereby serves

[11] "[T]he most important consideration in the creation of presumptions is probability. Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and time-saving to assume the truth of fact A until the adversary disproves it." *McCormick on Evidence* 807 (2d ed. E. Cleary 1972). No logical inference of "vindictiveness" arises, however, simply because charges are enhanced at a point subsequent in time to the defendant's exercise of some pretrial procedural right.

a legitimate prosecutorial objective. Thus, as this Court held in *Bordenkircher* v. *Hayes*, *supra*, it is wholly permissible for the prosecutor, engaged in plea negotiations prior to trial, to "up the ante" if the defendant insists on his right to stand trial. And the prosecutor certainly is free to seek enhanced charges in response to a defendant's repudiation of a plea agreement. See *United States* v. *Herrera*, 640 F.2d 958, 961-962 (9th Cir. 1981); *United States* v. *Moore*, 653 F.2d 384, 387-388 (9th Cir. 1981); *United States* v. *Anderson*, 514 F.2d 583, 588 (7th Cir. 1975). Similarly, if the defendant insists on seeking a transfer of venue to another district, and additional criminal charges are properly laid in that district but could not have been brought in the district where the indictment originally was returned, it should be permissible for the prosecutor to respond to the transfer by bringing additional valid charges. See pages 3, 18 n.13 of the government's petition for certiorari in *United States* v. *Hollywood Motor Car Co.*, No. 81-1144 (filed Dec. 17, 1981). By the same token, if a defendant challenges an indictment as duplicitous or as based on the wrong statute, the prosecutor's correction of the indictment, even if it results in an increase in charges, is entirely proper. See *United States* v. *Westoff*, 653 F.2d 1047, 1051 (5th Cir. 1981); see also *United States* v. *Partyka*, 561 F.2d 118, 124 (8th Cir. 1977); *United States* v. *Stacey*, 571 F.2d 440, 444 (8th Cir. 1978).

In short, there will be very few cases in which it may logically be inferred—even assuming that an increase in charges is a response to the exercise of a legal right before trial—that the prosecutor is imposing a "needless or arbitrary burden" (*Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 223) on the defendant's exercise of legal rights rather than pursuing a legitimate prosecutorial objective.[12] We doubt, therefore, that adoption of a

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[12] See also *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 27 n.13: "[I]t would be erroneous to infer a vindictive motive merely from the severity of the sentence recommended by the prosecutor [after

"presumption" of vindictiveness in the pretrial context is in accordance with reality or is a significant aid in isolating those few cases in which improper prosecutorial conduct occurs.

b. We have contended above that the search for prosecutorial vindictiveness through a "rigid constitutional rule" (*Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 365) at the pretrial stage of a criminal prosecution is an unjustified undertaking. Beyond this, however, the rigid prophylactic approach promises little realistic benefit for criminal defendants. A presumption of vindictiveness is not needed to protect defendants against charges that are unsupported by the evidence. By hypothesis, the charges in question are charges that are factually supported. The objection to the charges is not that they are without evidentiary support or are not in the public interest, but rather that the prosecutor had improper considerations in mind when he decided to obtain them. If, in fact, charges are without foundation, they will be screened out by the grand jury, the petit jury, and the reviewing court. Thus, there already are ample safeguards to prevent a vindictive prosecutor from obtaining charges that are unwarranted by the evidence or from charging innocent persons solely to satisfy a malicious purpose.[13]

Nor is the adoption of a rigid prophylactic rule needed to avoid "chilling" the exercise of procedural rights. This Court already has held that the "chilling effect"

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the defendant has succeeded in obtaining a retrial]. Prosecutors often request more than they can reasonably expect to get * * *."

[13] "[T]he defendants have the constitutional protection provided by the grand jury system to stand between them and their accusers. That system guarantees that, regardless of the motives of the prosecutor, the charges against them will be supported by probable cause before they must face them. Thereafter, the defendants can seek dismissal if the proofs are insufficient to support the charge. The jury, being unpersuaded, can acquit them. Finally, if the defendants are convicted, the Court itself stands as an effective shield * * *." *United States* v. *Andrews*, *supra*, 633 F.2d at 467-468 (Engel, J., dissenting).

rationale is not in itself a sufficient basis for adopting such a rule. See *Chaffin* v. *Stynchcombe*, *supra*. 412 U.S. at 29-35. And we are aware of no information suggesting that a rigid prophylactic rule, applied at the pretrial stage of a criminal prosecution, is necessary to facilitate the exercise of procedural rights. This record certainly contains no suggestion that prophylactic rules are required. In this case, respondent exercised his procedural right, the prosecutor obtained enhanced charges, and respondent continued to insist on his right to stand trial before a jury. Thus, respondent "was not himself 'chilled' in the exercise of his right * * * by the possibility of a higher sentence * * * and we doubt that the 'chill factor' will often be a deterrent of any significance." *Id.* at 33.

Application of a "chilling effect" rationale in cases such as this, in which it is supposed that criminal defendants might be discouraged from insisting on their right to stand trial or to demand trial by jury, would be particularly inappropriate. Even assuming that prosecutors sometimes prefer increased charges against defendants who insist on such rights, and that the effect of this action is to encourage guilty pleas and trials by magistrate rather than resource-consuming trials by jury, that would be wholly permissible under *Bordenkircher* v. *Hayes*, *supra*, and *Corbitt* v. *New Jersey*, *supra*. To the extent that prosecutors attempted to achieve such objectives, they would be serving "the interest of the State in efficient criminal procedure" (*Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 220 n. 9), and would not be imposing a "needless or arbitrary burden on the exercise of constitutional rights" (*id.* at 223).

2. *a.* While we are of the view that the benefits stemming from the use of prophylactic rules at the pretrial stage of a criminal prosecution are minimal, the burdens imposed on trial judges, prosecutors, and criminal defendants as a class are substantial. Claims of vindictive prosecution can be fashioned in almost every case

in which it is necessary to adjust charges, since defendants in criminal cases may claim in nearly every instance that such adjustments occurred subsequent in time to the exercise of some procedural right (see note 8, *supra*). Such claims are not limited, moreover, to cases in which charges are increased. Whenever the prosecutor takes some action contrary to the interests of the accused, that action can be characterized as "vindictive." [14] Thus, defendants have contended that any modification of charges—even a *reduction* in charges—has the potential for "prejudice" of various kinds and gives rise to a presumption of vindictiveness requiring a hearing to explore the prosecutor's motives. See the government's petition for certiorari in *United States* v. *Hollywood Motor Car Co.*, No. 81-1144, *supra*, at 5, 18 n.13; see also *United States* v. *D'Alo*, 486 F. Supp. 954, 960 (D.R.I. 1980). Prophylactic rules have created a powerful temptation for "[d]efense counsel * * * to monitor every word spoken by a prosecutor, in and out of court, to find some phrase indicative of his 'vindictiveness.'" *Koski* v. *Samaha*, 648 F.2d 790, 798 (1st Cir. 1981). Defendants have even claimed, with judicial acceptance, that prosecutorial action contrary to their interests is "vindictive" if it is made in connection with future "possible motions" by the defense. See *United States* v. *Alvarado-Sandoval*, 557 F.2d 645, 646 (9th Cir. 1977); *United States* v. *Andrews*, *supra*, 633 F.2d at 459 (Merritt, J., dissenting).

The outpouring of such motions in the federal courts in the last decade has imposed a substantial burden on district judges who are required to conduct hearings and to expend scarce resources for the resolution of such

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[14] "During the pretrial and trial process, the prosecutor must decide what position to take on an endless variety of procedural, evidentiary, substantive and tactical questions. He may oppose motions to suppress evidence or for the appointment of counsel or refuse to agree to discovery, severance, bail, or plea bargaining * * *." *United States* v. *Andrews*, *supra*, 633 F.2d at 459 (Merritt, J., dissenting).

claims. Some circuits now place a "heavy burden" of rebuttal on the prosecutor whenever the defendant alleges a "mere appearance" of vindictiveness (see, *e.g.*, *United States* v. *Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976)), and place an equally heavy burden on the district courts to conduct "an evidentiary hearing where the government's explanations can be formally presented and tested," complete with "findings of fact and conclusions of law" (*United States* v. *Andrews*, *supra*, 633 F.2d at 457). Judge Engel, dissenting in *Andrews*, explained the practical effect of such procedures, which under ordinary circumstances must be completed before trial (*id.* at 466-467):

> My most fundamental objection is that the pre-trial procedures mandated by the majority opinion are wasteful of time, will unnecessarily delay the trial and are altogether out of proportion to the problem which is perceived.
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> The result, regardless of success, is delay. As this opinion is written, nearly five years have transpired since the alleged offenses and arrest [of the defendants] in November, 1975. It is true that not all delays are due to this litigation, but it has since March, 1978 played a substantial role in that delay. The majority rule places a heavy burden upon district courts without sufficient promise of benefit to justify it.

He added that such procedures create "needless complication and further uncertainty in the already overburdened processes leading from arrest to trial" (*id.* at 467). Thus, weighing the "potential benefits" of this approach against its "potential injury" in the form of increased burdens on the district court (*United States* v. *Calandra*, 414 U.S. 338, 349 (1974), it is sufficiently clear that a convincing case has not been made for extending prophylactic rules that presume vindictiveness to the pretrial stage.

b. The burden on prosecuting attorneys resulting from such prophylactic rules also is substantial. At a minimum, the prosecutor must file affidavits, and perhaps also testify, about his or her reasons for seeking enhanced charges or taking other action contrary to the interests of the accused, in order to rebut a "presumption" of maliciousness. Briefing and oral argument must then ensue (see C.A. App. 53-79; Nov. 7, 1979 Tr. 169-210), and the claim of prosecutorial vindictiveness is almost always renewed on appeal. This collateral litigation consumes scarce prosecutorial resources and hampers vigorous law enforcement efforts by prosecutors, who may refrain from bringing valid supplemental charges "to avoid later becoming embroiled in a 'retaliation' controversy." *United States* v. *Andrews*, *supra*, 633 F.2d at 461 (Kennedy, J., dissenting).

Beyond this, however, prophylactic rules, with their attendant presumption of malicious conduct, effectively turn the tables of the criminal case and place the discretionary charging decision of the prosecutor on trial at the commencement of the litigation. This creates an unseemly confrontation between judicial and executive authorities because it "represents an intrusion into an area historically reserved to the executive branch" (*id.* at 462, Engel, J., dissenting). Both the Constitution and federal statute expressly provide that it is the executive branch alone that must "take Care that the Laws be faithfully executed." See United States Constitution, Article II, Section 3; 28 U.S.C. 515-519, 547. In emphasizing this fundamental principle of separation of powers, Judge Engel cited (633 F.2d at 466) the opinion of Chief Justice Burger, then Circuit Judge, in *Newman* v. *United States*, 382 F.2d 479, 481 (D.C. Cir. 1967): "An attorney for the United States, * * * as agent and attorney for the Executive, * * * is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment."

c. Finally, the predictable consequence of adopting "presumptions" and prophylactic rules that limit, if not foreclose, the discretion of prosecutors to increase charges is that prosecutors will be heavily influenced to bring the most severe charges possible at the outset of the litigation to avoid subsequent claims of "retaliation." [15] The practical effect of a presumption of vindictiveness "is that a prosecuting attorney must see to it that formal charges are *initially* filed for the most serious offense of which a defendant may be guilty or else forever forfeit the right to so prosecute him if the defendant contests the prosecution in any way" (Pet. App. 15a; Widener, J., dissenting). Or, in the words of Judge Kennedy, dissenting in *Andrews* (633 F.2d at 461), "the prosecutor may be forced to bring every charge he conceivably can against each defendant at the initiation of the proceedings * * *." Thus, the prophylactic rule adopted in this case is "to the detriment of both defendant and State," because it will "diminish the likelihood" of "lenient" charging decisions at the outset of criminal prosecutions. *Colten* v. *Kentucky*, *supra*, 407 U.S. at 119; see also *United States* v. *Partyka*, *supra*, 561 F.2d at 124.

d. The literal terms of the Due Process Clause do not require that heavy burdens, of the kind that we have discussed, be placed on the judiciary, prosecuting attorneys, and criminal defendants as a class. Moreover, as we have demonstrated above, this Court has never suggested that the prophylactic rules of *Pearce* and *Perry* apply to pretrial increases in criminal charges. Since the costs of extending the vindictiveness presumption of *Pearce* and *Perry* so clearly outweigh any speculative benefits, we submit that the flexible require-

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[15] Prosecutors fully realize that, if a retaliation controversy arises, they may lose the opportunity to try charges that are amply supported by the evidence. Thus, prophylactic rules are "more drastic than * * * the exclusionary rule, for [they] would exclude not merely evidence of crime but the government's right to seek prosecution on the charge itself." *United States* v. *Andrews*, *supra*, 633 F.2d at 462 (Engel, J., dissenting).

ments of due process are best served by confining those decisions to their intended ambit—increases in penalties that occur at the post-conviction stage of criminal prosecutions.

II. THE FACTS OF RECORD DO NOT DISCLOSE A GENUINE HAZARD OF PROSECUTORIAL RETALIATION SUFFICIENT TO JUSTIFY A PRESUMPTION OF VINDICTIVENESS IN THIS CASE

For the reasons that we have summarized above, the prophylactic rules of *Pearce* and *Perry* should never be applied to increases in charges that occur at the pretrial stage of a criminal prosecution. However, even if this Court were to disagree with that submission, and were to conclude that a presumption of vindictiveness may be appropriate in *some* pretrial situations, there still would be no occasion to apply that presumption in a case such as this. As the decisions of this Court establish, prophylactic rules are never appropriate unless there is a clear danger of vindictiveness in the particular situation under review. The nature of the right exercised by respondent is not such that prosecutors would generally be likely to retaliate by increasing charges in cases like this one. Nor does the record even remotely suggest that the prosecutor's decision to increase charges in this case was likely to have been a vindictive response to the defendant's decision to stand trial.

A. Prophylactic Rules Do Not Apply Unless There Is A Substantial Danger of Vindictiveness

The major premise of the court of appeals' decision to apply the prophylactic rules of *Pearce* and *Perry* to the facts of this case was its perception that respondent may have experienced a "fear of prosecutorial vindictiveness" that would "chill" the exercise of his right to stand trial and to demand a jury (Pet. App. 5a-6a). This Court's decisions establish, however, that the relevant focus is not on "the possibility that a defendant might be deterred from the exercise of a legal right * * *, but

rather [on] the danger that the State might be retaliating against the accused." *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 363. See also *Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 218 ("not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid"). Thus, there is "no doubt about the constitutional validity" of higher charges "in the absence of vindictiveness despite whatever incidental deterrent effect they might have * * *" (*Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 29). The relevant concern is "actual vindictiveness" (*id.* at 26). Prophylactic rules designed to prevent "actual vindictiveness" apply only when there is a "realistic likelihood of 'vindictiveness'" (*Blackledge* v. *Perry*, *supra*, 417 U.S. at 27), a "hazard of being penalized" solely for exercising a legal right (*Colten* v. *Kentucky*, *supra*, 407 U.S. at 116), or a "real threat of vindictiveness" that is more than "de minmis" (*Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 25-26, 28).[16]

"Put another way, the mere appearance of vindictiveness is not enough. * * * The factual situation must pose a realistic likelihood of vindictiveness." *United States* v. *Andrews*, *supra*, 633 F.2d at 455. Moreover, the standard is "an objective one." It "does not depend on a defendant's subjective impressions." *Id.* at 454. This Court's decisions clearly establish that a bare assertion that the defendant experienced a "chilling effect" is totally inadequate to give rise to a presumption of vindictiveness. *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 29-35. As we demonstrate below, there is no genuine

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[16] Inexplicably, despite the clarity of this Court's pronouncements on this subject, some courts have held that a presumption of vindictiveness arises whenever there is a change in charges that gives rise to a "mere appearance of vindictiveness." See, *e.g.*, *United States* v. *Ruesga-Martinez*, *supra*, 534 F.2d at 1369 ("the mere *appearance* of vindictiveness is enough to place the burden on the prosecution") (emphasis in original); *United States* v. *Jamison*, 505 F.2d 407, 416 (D.C.Cir. 1974) (the "possibility of retaliation" is sufficient).

hazard of vindictiveness in the present case that could be thought to justify the adoption of a prophylactic rule.

B. Nothing In The Record In This Case Suggests That The Prosecutor Obtained Enhanced Charges For The Explicit Purpose Of Penalizing Respondent For Exercising A Legal Right

The record in this case is so far removed from a situation in which a genuine likelihood of vindictiveness exists that the court of appeals was able to say (Pet. App. 4a): "On this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment." Indeed, there has never been a claim from respondent that the prosecutor acted vindictively. As respondent candidly stated in his memorandum in support of his motion to dismiss count one of the indictment (J.A. 18): "At the outset, it must be noted that the defendant does not assert actual vindictiveness on the part of the Government." In view of respondent's own concession, which is supported by the record and by the finding of the court of appeals, there is no possible basis for the view that this case presents a genuine danger of vindictiveness. If there was no vindictiveness *in fact*, there can be no realistic danger of vindictiveness. See *Moon* v. *Maryland*, 398 U.S. 319, 320-321 (1970), where this Court concluded that there could be no violation of *Pearce* in light of the defendant's "dispositive" concession: "I have never contended that Judge Pugh was vindictive."

In any event, wholly apart from respondent's concession and the court of appeals' conclusion, the facts in this case do not support an inference that there is a genuine hazard of vindictiveness. It is undisputed that neither of the prosecuting attorneys who participated in this case ever threatened respondent with increased charges. As noted on page 4 above, Ms. Bruce, the original prosecutor who engaged in plea discussions, never gave any thought to the possibility that increased charges might be obtained. And Mr. Norton, the suc-

cessor prosecutor who obtained increased charges, never discussed the possibility of a waiver of any legal right. Moreover, Ms. Bruce merely responded to a *defense inquiry* about a possible guilty plea. There is no suggestion that either Ms. Bruce or Mr. Norton were dissatisfied with respondent's decision to seek a trial by jury or viewed it as anything other than a routine pretrial decision. If either prosecutor had in fact desired to chill the exercise of respondent's right to a jury trial, he or she would have threatened respondent with an increase in charges to obtain a waiver of the constitutional right.

In addition, the chronology of relevant events is not in the least suggestive of vindictiveness. The original charges in this case were filed by a police officer, who could not himself obtain a felony indictment. Three years later, after respondent was returned to the jurisdiction, the case was assigned to Ms. Bruce, who appeared temporarily before the magistrate. She too lacked power to obtain a felony indictment. Finally, when it became clear that the case was going to be tried before a jury and that trial preparation would be required, it was transferred to an Assistant U.S. Attorney who commenced trial preparation. Only after he had worked on the case for a substantial period of time did he decide to seek a felony indictment. See pages 5-7, *supra*.

These facts do not suggest a vindictive response to a decision to stand trial and demand a jury. They simply show that lenient charges, originally preferred by a police officer, were deemed inadequate by a successor prosecutor who reevaluated the case three years later in the course of preparing for trial.[17] Moreover, it is

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[17] See *United States* v. *Sturgill*, 563 F.2d 307, 309-310 n.3 (6th Cir. 1977):

> The original complaint was signed by a supervisory security assistant at the Naval Ordnance Station. * * * [W]e think that additional charges in the information would probably be justified, even if the potential sentence was significantly increased. To hold otherwise would unduly restrict the prosecuting attorney from making an independent examination of

undisputed that the prosecutor who obtained the increased charges was not the same prosecutor who engaged in unsuccessful plea discussions with the defense. See generally *Colten* v. *Kentucky*, *supra*, 407 U.S. at 117. To perceive a genuine hazard of "vindictiveness" in such a set of circumstances, we submit, is to indulge imagination rather than rational inference.

III. EVEN IF THE PROPHYLACTIC RULES OF *PEARCE* AND *PERRY* APPLY IN THIS CASE, THE PROSECUTOR FULLY JUSTIFIED HIS ACTIONS

As we have argued in Part I, the prophylactic rules of *Pearce* and *Perry* have no application in this case because they should not be extended to increases in charges that occur at the pretrial stage of a criminal prosecution. Moreover, as we have contended in Part II, even if such rules were thought to apply to some pretrial modifications of charges, those rules should not be applied in the present case because there is no realistic danger of vindictiveness. However, even if this Court were to disagree with both of these submissions, the decision of the court of appeals should still be reversed. That result is required because the prosecutor has completely dispelled any appearance of vindictiveness that reasonably could be thought to arise on this record.

A. An Appearance Of Vindictiveness Resulting From Pretrial Increases In Charges Is Always Subject To Rebuttal By Evidence Showing That The Prosecutor Was Motivated By A Valid Purpose

For the reasons summarized on pages 13-39, *supra*, we submit that the adoption of "presumptions" of vindictiveness, which require the prosecutor to come forward with evidence justifying charges obtained after the accused

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the criminal conduct and substituting his formulation of the appropriate charges in place of the lay person's. In such a situation it does not appear that there is a "realistic likelihood of vindictiveness."

exercises a pretrial right, is a fundamentally misguided approach. This prophylactic approach serves no substantial purpose: it imposes needless burdens on trial judges, prosecutors, and defendants as a class. However, if prophylactic rules of any kind are to be recognized in the pretrial context, it is essential that prosecutors be granted broad latitude to rebut any asserted appearance of vindictiveness to avoid an undue restraint on their charging discretion. At the preliminary stage of a criminal prosecution, enhanced charges are frequently required because the prosecutor receives new information about the accused during the course of trial preparation. In addition, enhanced charges may be warranted to serve legitimate prosecutorial objectives of the kind discussed by this Court in *Bordenkircher* and *Corbitt*. Any prophylactic rule recognized in the pretrial phase of a criminal case must be sufficiently flexible to accommodate the legitimate needs of the prosecutor in exercising charging discretion.

Even at the post-conviction stage of a criminal prosecution, where this Court has concluded that the hazard of vindictiveness is great and the need for flexibility in adjusting penalties is diminished, it is well established that any appearance of vindictiveness can be dispelled if adequate non-vindictive reasons "affirmatively appear." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 726; see also *Blackledge* v. *Perry*, *supra*, 417 U.S. at 29 n.7. Moreover, when criminal defendants have claimed that differential penalties impose a burden on the exercise of a pretrial right, such as the right to stand trial, this Court's decisions have been quick to penetrate any superficial appearance of vindictiveness. See *Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 223: "We discern no element of retaliation or vindictiveness against Corbitt for going to trial. There is no suggestion that he was subjected to unwarranted charges. Nor does this record indicate that he was being punished for exercising a constitutional right."

While some circuits, such as the Fourth Circuit in the case presently under review, have made it nearly impossible for the prosecutor to rebut the "appearance" of vindictiveness, other circuits, such as the Fifth Circuit, have adopted a more pragmatic approach. In the Fifth Circuit, "the prosecutor may rebut * * * prima facie proof [of vindictiveness] by establishing [that] his reasons for adding the * * * new charges were other than to punish a pesky defendant for exercising his legal rights." *Hardwick* v. *Doolittle*, *supra*, 558 F.2d at 301. The Fifth Circuit added that "explanations which would negate vindictiveness could include mistake or oversight in the initial action, a different approach to prosecutorial duty by the successor prosecutor, or public demand for prosecution on the additional crimes allegedly committed. The list is intended to be illustrative rather than exhaustive." *Ibid.* Accord, *Jackson* v. *Walker*, 585 F.2d 139, 148-149 & n.20 (5th Cir. 1978); *Miracle* v. *Estelle*, *supra*, 592 F.2d at 1277 n.14 (noting that "[a]n increase in the severity or number of charges if done without vindictiveness may be easily explained").

The Second Circuit also recognizes that a different approach by a successor prosecutor is sufficient to rebut a charge of vindictiveness. See *United States* v. *Ricard*, *supra*, 563 F.2d at 48 ("Another attorney had originally handled the case and filed the information charging a misdemeanor. The case was later assigned to [a successor prosecutor], and when she reviewed the file several weeks before the trial date, she realized the facts warranted adding a felony charge"). Similarly, the Sixth Circuit, sitting en banc in *United States* v. *Andrews*, *supra*, 633 F.2d at 456, recognized that increased charges may be justified simply because the prosecutor who obtained the original charges "was inexperienced" and failed to recognize the appropriateness of additional charges.

While we submit that all of these decisions suffer from a fundamental defect because they place the prosecutor

on trial at the commencement of the prosecution, mandate burdensome and time-consuming hearings, and inhibit the exercise of prosecutorial discretion by encouraging collateral litigation on the prosecutor's good faith, they at least have the merit of permitting the prosecutor broad latitude in rebutting defense allegations of prosecutorial misconduct. And if any presumptions of vindictiveness are to be indulged in the pretrial context, it is essential that the prosecutor be afforded an unrestricted opportunity to explain that increases in charges are justified by proper considerations.

B. The Prosecutor Clearly Established That The Increased Charges In This Case Rested On Proper Considerations

As summarized on pages 5-7, *supra*, the prosecutor in this case fully sustained any burden of explanation that rested on him. The prosecutor affirmed under oath in his affidavit, without contradiction of any kind, that the increased charges in this case rested on his investigation of respondent during pretrial preparation, which occurred after the case was transferred to him from another prosecuting attorney.[18] That investigation disclosed that, after the initial misdemeanor charges were lodged against respondent by Officer Morrissette, respondent fled to California, where he was convicted and imprisoned for another offense. Thereafter, respondent was tried

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[18] In our view, it is entirely irrelevant that the government might have obtained the information in question before respondent exercised his right to trial by jury. The pertinent question is whether the government acted on the basis of permissible considerations when it obtained increased charges, not whether it satisfied some standard of "due diligence" in finding all relevant information at a given point before trial. In any event, the district court correctly found, based on uncontradicted evidence, that the increased charges here were the product of continuing investigation and that "the prosecutor was not aware of the additional information on which the indictment was based" until after respondent exercised his procedural right (Pet. App. 23a).

and convicted in Virginia for attempting to shoot a police officer and for possession of large quantities of heroin. The prosecutor also considered the fact that respondent had committed perjury during his preliminary hearing in Hyattsville in 1976, and fled from the jurisdiction before his scheduled trial after being released on his own recognizance. In addition, the prosecutor's investigation disclosed that respondent was known to the federal Drug Enforcement Administration and to local police as a major heroin dealer, who associated with other persons who smuggled heroin from Mexico into several different states (see Pet. App. 25a-31a).

In view of this information, and the fact that respondent had committed a serious crime when he resisted arrest and struck Officer Morrissette with his automobile on the Baltimore-Washington Parkway, the prosecutor concluded that a felony count was fully warranted. The prosecutor's decision had nothing to do with respondent's exercise of a procedural right. As the prosecutor affirmed in his affidavit: "[M]y decision to seek a grand jury indictment was not motivated in any way by, nor did I ever consider Goodwin's request for a trial by jury in the United States District Court" (Pet. App. 31a). In these circumstances, it is certainly not surprising that the district court expressly found, after reviewing all of the evidence of record bearing on the issue of prosecutorial vindictiveness, that the prosecutor had "adequately dispelled any appearance of vindictiveness" (*id.* at 22a).

Unless this Court is prepared to adopt a prophylactic rule of unprecedented stringency, and to reject on a per se basis nearly every explanation for increased charges after an accused exercises a procedural right in the pretrial stage of a criminal case, the explanation offered in this case must be credited. In view of the prosecutor's overwhelming demonstration of good faith performance of duty, the sufficiency of the prosecutor's rebuttal can be summed up adequately in the words of the Fifth Cir-

cuit in *United States* v. *Thomas*, 617 F.2d 436, 438 (1980):

> By the time of the later indictment, the facts had unfolded to such a degree that a prosecutorial failure to go forward * * * would have been a dereliction of duty. There it ends.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, *Petitioner*

v.

LEARLEY REED GOODWIN

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the respondent's prosecution for felony charges based on the same conduct underlying the original lesser charges was a denial of due process of law where the more serious charges were substituted only after he had exercised his right to a jury trial on the original charges and in the absence of any intervening justification?

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IN THE

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OCTOBER TERM, 1981

No. 80-2195

UNITED STATES OF AMERICA, *Petitioner*

v.

LEARLEY REED GOODWIN

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Following his trial by jury in the United States District Court for the District of Maryland, the respondent was convicted of forcibly assaulting a federal officer, in violation of 18 U.S.C. § 111, and of fleeing or eluding a police officer, in violation of 18 U.S.C. §§ 7 and 13, and Md. Trans. Code Ann. § 21-904 (1977). He was sentenced to consecutive terms of imprisonment of five years and one year, respectively. On appeal to the United States Court of Appeals for the Fourth Circuit, the respondent's conviction for forcible assault of a federal officer was reversed on the grounds that he was denied due process of law by the institution of the felony charge only after he had exercised his right to a jury trial on the petty offense and misdemeanor charges initially brought against him for the same underlying conduct. The pertinent facts are set forth in the

appellate court's opinion (Pet. App. 2a-4a), and briefly stated, they are as follows:

1. On February 2, 1976, at approximately 7:00 p.m., the respondent was stopped for speeding on the Baltimore-Washington Parkway by United States Park Police Officer James Morrissette. (C.A. App. 91-108).[1] After stopping, the respondent emerged from his vehicle and provided Officer Morrissette with license and registration information. While speaking with the respondent, the officer directed his flashlight into the vehicle and observed a clear plastic bag underneath the armrest next to the driver's seat. Pursuant to the officer's request, the respondent reentered his vehicle and lifted the armrest. As he did so with his right hand, he grabbed the clear plastic bag with his left and threw the bag onto the floor area. The vehicle was then placed into gear and rapidly accelerated. As the car started forward, it "fishtailed," striking Officer Morrissette. (*id.* at 100-01). The officer returned to his car and pursued the respondent at a high rate of speed, but was unable to apprehend him. (*id.* at 101-03).

The next day, Officer Morrissette filed a complaint in the United States District Court for the District of Maryland, at Hyattsville, (a magistrate level tribunal), charging the respondent with the following misdemeanors and petty offenses: (1) unlawfully failing to give aid, information and identification at the scene of a personal injury accident, in violation of 18 U.S.C. §§ 7 and 13, and Md. Trans. Code Ann. §§ 20-102, 20-104; (2) assault by striking, beating or wounding, in violation of 18 U.S.C. § 113(d); (3) fleeing or eluding a police officer, in violation of 18 U.S.C. §§ 7 and 13, and Md. Trans. Code Ann. § 21-904; (4) reckless driving, in violation of Title 36, Code of Federal Regulations, § 50.32; (5) exceeding the posted speed limit, in violation of 36 C.F.R. § 50.31 (2

[1] "C.A. App." refers to the joint appendix in the court of appeals.

counts).[2] (Pet. App. 2a; J.A.10). The respondent was arrested on March 11, 1976, and subsequently appeared before the United States Magistrate at Hyattsville on March 30, 1976, for a preliminary hearing on the misdemeanor charge of fleeing or eluding.[3] The court found probable cause, and scheduled trial on the aforementioned charges for April 29, 1976. (Pet. App. 2a-3a). After being released on his own recognizance, the respondent failed to appear for trial. (*ibid*).

In March, 1979, the court was informed that the respondent had been located in a correctional facility in Arlington, Virginia, where he was awaiting sentencing on state charges. Due to the logistical problems involved in returning the respondent to the District of Maryland for trial, the United States Attorney's office in Baltimore was contacted. After communication between Assistant United States Attorney Edward M. Norton and state authorities in Virginia and California, an agreement was reached whereby the respondent would be released to the custody of the United States Marshal for the District of Maryland, to be returned to California state authorities upon completion of the federal proceedings. During his contact with the Virginia state authorities, prosecutor Norton was advised that the respondent was awaiting sentencing for his convictions of attempting to shoot a police officer and possession of heroin. (Pet. App. 25a-27a).

On May 24, 1979, the respondent was returned to the Hyattsville court for trial on the aforementioned complaint, as well as on the further charge of failure to appear, in violation of 18 U.S.C. § 3150. The respondent's case was assigned to Ms.

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[2] The maximum potential penalty for these various charges, assuming conviction and consecutive sentences for each, is four years and two months.

[3] The respondent was not entitled to such a hearing on the remaining charges which were petty offenses. Rule 5, Federal Rules of Criminal Procedure.

Blanche Bruce, a trial attorney from the anti-trust division of the Department of Justice in Washington who was on a special detail to Hyattsville to prosecute petty offenses and misdemeanor cases before the magistrate. (J.A. 25-26). During the course of her trial preparation, Ms. Bruce read the incident report filed by Officer Morrissette and discussed the offenses with him. Pursuant to her review of the report and conversations with the officer, she was aware of the underlying facts of the incident. *(ibid)*.

Prior to the respondent's appearance before the magistrate, Ms. Bruce was approached by defense counsel for the respondent who inquired whether the prosecution would consider a plea. Although Ms. Bruce expressed some interest in the proposal, the respondent thereafter informed his attorney that he did not wish to plead guilty and desired a jury trial. During these discussions, there was no consideration given or reference made to possible additional or more serious charges being brought against the respondent. (*ibid*).

As a result of the respondent's plea of not guilty and his request for a jury trial, the case was transferred to the United States District Court for the District of Maryland, at Baltimore.[4] The prosecution of the respondent's case was assigned to prosecutor Norton, who conducted pre-trial preparation of the case. (Pet. App. 25a-31a). Subsequently, the prosecutor sought and obtained a four-count indictment charging the defendant with fleeing or eluding a police officer and failure to appear, as previously charged, as well as the additional felony charges of assault upon a federal officer, in violation of 18 U.S.C. § 111, and assault with a dangerous weapon, in violation of 18 U.S.C. § 113(c). (J.A. 12-14).

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[4] In May, 1979, there was no provision allowing a trial by jury before a magistrate. Therefore, a request for a jury trial divested the magistrate of jurisdiction to hear the case. However, 18 U.S.C. § 3401(b), as amended on October 10, 1979, now provides for a trial by jury before a magistrate.

On September 12, 1979, a jury found the respondent guilty of felonious assault upon a federal officer and of the misdemeanor charge of fleeing or eluding a police officer. He was acquitted on the charge of assault with a dangerous weapon, and the failure to appear charge, which had been severed for purposes of trial, was later dismissed. (J.A. 6,8).

Subsequent to the verdict, the respondent moved for the dismissal of the felonious assault charge on the grounds that the filing of this charge violated his Fifth Amendment right to due process of law. (J.A. 15-21). The respondent did not rely upon actual vindictiveness on the part of the government, (*id.* at 18), but contended that the appearance of vindictiveness which existed as a result of the increased charges deprived him of due process of law. (*id.* at 21). In response to that motion, prosecutor Norton submitted an affidavit explaining his decision to seek the felony charges. (Pet. App. 25a-31a). In summary, the prosecutor stated that: (1) the defendant's conduct on February 2, 1976, was considered to be a serious violation of law; (2) the defendant had a lengthy history of violent crime; (3) the defendant's conduct on February 2, 1976, was considered to be related to major narcotics trafficking; (4) the defendant was believed to have committed perjury when he testified at his preliminary hearing; and (5) the defendant had failed to appear for trial on April 29, 1976. Although the trial court granted relief from the waiver provisions of Rule 12(b) of the Federal Rules of Criminal Procedure, the respondent's motion was denied.[5] (Pet. App. 18a-23a).

A divided panel of the court of appeals reversed the respondent's felony conviction. (Pet. App. 1a-15a). The court disclaimed any reliance upon the notion that actual vindictiveness

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[5] The district court rendered its decision on this issue based on a statement of stipulated facts, affidavits, motion papers, and oral argument. (J.A. 24-25).

motivated the seeking of the felony indictment. (*id.* at 4a). However, while finding no actual vindictiveness, the majority concluded that the circumstances surrounding the return of the felony charge subsequent to the respondent's invocation of his right to a jury trial gave rise to a genuine risk of retaliation. (*id.* at 6a). The court stated:

> Lest exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges, once the right was exercised, at least where there is no showing that the charges could not have been brought before defendant made his election for a jury trial.

(*id.*) Judge Widener dissented, arguing that the prosecutor's actions in this case were sanctioned by this Court's decision in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). (Pet. App. 14a-15a).

A petition for rehearing *en banc* filed by the government was denied on April 16, 1981.

SUMMARY OF ARGUMENT

1. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court established a due process limitation on the imposition of sentence upon reconviction, concluding that an accused who has successfully attacked his conviction on appeal may not be subjected to a more severe sentence upon retrial and conviction, absent identifiable conduct occurring after the original sentencing proceeding. This prophylactic rule was adopted and applied to the issue of prosecutorial vindictiveness in *Blackledge* v. *Perry*, 417 U.S. 21 (1974). These cases implemented essential due process protections against retaliatory conduct by the government for the assertion of procedural rights, as well as the apprehension of such vindictiveness, by fashioning a special prophylactic measure whose application is warranted where there exists a realistic likelihood of vindictiveness.

In the instant case, there existed a realistic likelihood of vindictiveness since the prosecutor possessed a considerable interest in deterring the exercise of the right to a district court jury trial. Given the enormous difference in expenditure of prosecutorial resources between a court trial before the magistrate and a district court jury trial, there was ample incentive on the part of the prosecutor to deter the exercise of this right. Moreover, since the increased charges levied against the respondent subsequent to his exercise of his right to a jury trial were based on the identical conduct underlying the original charges, the prosecutorial interest in the unfettered exercise of its discretion is diminished. Indeed, having once exercised its charging authority to prosecute the respondent for his criminal conduct, the substituted charges are more likely the result of a vindictive motive.

Pursuant to this Court's teachings in *Pearce* and *Perry*, this realistic likelihood of vindictiveness presented in the case under review warrants application of the prophylactic rule established in those cases. Such a rule is appropriately applied in a pre-trial setting once having established that a genuine hazard of vindictiveness inheres in the particular context. Such application neither unduly burdens or interferes with the proper exercise of prosecutorial discretion since the prosecution remains free to bring increased charges if justified by numerous circumstances including the receipt of new information during pre-trial investigation concerning the accused or other circumstances that rendered prosecution on the more serious charges impossible at the outset of the case. While this due process standard necessarily constrains prosecutorial discretion to a limited extent, such restraint is constitutionally mandated and does not infringe upon prosecutorial discretion where that discretion is properly and competently exercised. *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), also does not preclude application of the *Pearce/Perry* prophylactic to the pre-trial stage of a criminal proceeding. *Bordenkircher* was based upon this Court's express deter-

mination that plea bargaining is a necessary component to the administration of the criminal justice system, and that any element of punishment or retaliation is absent from that process so long as the accused is free to accept or reject the prosecution's offer. Given the absence of the "give-and-take" of plea bargaining in this case, *Bordenkircher* does not control.

2. The due process rationale of *Pearce* and *Perry* require that increased charges following a defendant's exercise of a procedural right must be justified by a narrowly defined showing of objective, non-retaliatory factors. While such a rule necessarily limits prosecutorial discretion to some degree, the restraint is narrowly confined to do no more than is required by due process, that is, to assure an absence of vindictiveness or an appearance thereof.

In the instant case, the prosecutor failed to sustain this burden of rebuttal. At the time of the respondent's exercise of his right to a jury trial, the prosecution was aware of the information which is offered in support of the increased charges. However, the prosecution was then content to proceed before the magistrate on the petty offense and misdemeanor charges. The prosecution had ample opportunity to reassess the propriety of these charges, and could easily have declined to proceed pending further review. Nevertheless, the prosecution against the respondent on the lesser charges would have proceeded but for his election of a jury trial. Under these circumstances, the opportunities for vindictiveness are such as to require the application of the *Pearce/Perry* rule.

I. THE OPPORTUNITIES FOR VINDICTIVENESS PRESENTED BY THE FACTS OF THIS CASE — WHERE THE PROSECUTION INITIATED MORE SERIOUS CHARGES ONLY AFTER THE RESPONDENT HAD EXERCISED HIS RIGHT TO A DISTRICT COURT JURY TRIAL AND IN THE ABSENCE OF INTERVENING JUSTIFICATION — ARE SUCH THAT DUE PROCESS OF LAW REQUIRES THE APPLICATION OF THE PROPHYLACTIC MEASURE ESTABLISHED IN *NORTH CAROLINA* V. *PEARCE* AND *BLACKLEDGE* V. *PERRY*.

In reliance upon this Court's teachings in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the court of appeals concluded that the respondent's due process rights were violated by the felony prosecution which was not instituted until subsequent to his election to be tried by a jury on lesser charges based on the same conduct, even though the facts which motivated the filing of the increased charges were available to the government before the exercise of the right to a jury trial. The petitioner contends that such reliance was misplaced, asserting that either these authorities do not apply to the instant case or that their requirements are satisfied. The petitioner's argument is based on an unduly restrictive interpretation of these cases and on an unwarranted application of that case law to the peculiar facts of this case.

A. The Policies Underlying The Prophylactic Rule Developed In *Pearce* And Adopted In *Perry* Are Implicated Whenever A Realistic Likelihood of Vindictiveness Inheres In A Given Situation.

In *North Carolina* v. *Pearce*, *supra*, this Court considered the constitutional implications of the imposition of enhanced sentences upon defendants who had successfully challenged their original conviction. Although expressly rejecting the contention that either the protection against double jeopardy or the Equal Protection Clause precluded harsher sentences upon reconviction, this Court recognized due process constraints on this exercise of judicial discretion. This Court concluded that an

accused who has successfully attacked his conviction on appeal may not be subjected to a more severe sentence upon retrial and conviction, absent identifiable conduct on the part of the defendant occurring after the original sentencing proceeding which justify such a sentence. *id.* at 726.

This holding was grounded, in part, upon the principle of law that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *id.* at 725. However, while cognizant of the obvious impropriety of such an express punitive policy, this Court also emphasized the need to obviate the deterrent effect produced by the apprehension of such vindictiveness:

> And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

ibid. Finding that a genuine risk of vindictiveness inhered in this resentencing process, *id.* at 725, n.20, this Court fashioned the prophylactic measure designed to prevent not only actual vindictiveness, but "the wrong [that] would extend . . . to those who elect not to exercise their rights of appeal because of a legitimate fear of retaliation." *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 25 (1973).

In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), this Court declined to apply the *Pearce* due process rationale to a two-tiered system of criminal adjudication whereby a defendant may seek a trial *de novo* after conviction of a misdemeanor in an inferior court, but risks greater punishment if again convicted. Reiterating its justification for the prophylactic rule restricting imposition of increased sentences upon reconviction, this Court concluded that a similar possibility of vindictiveness was not

inherent in Kentucky's two-tiered system, and distinguished *Pearce* primarily by the fact that:

> [t]he court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly.
>
> * * *
>
> In all likelihood, the trial *de novo* court is not even informed of the sentence imposed in the inferior court and can hardly be said to have "enhanced" the sentence.

id. at 116-117, 118. This Court also discounted any systemic concerns that would improperly motivate the second sentencing court, finding no reason "to assume that the *de novo* court will deal any more strictly with those who insist on a trial in the superior court after a conviction in the Quarterly Court than it would with those defendants whose cases are filed originally in the superior court . . ." *id.* at 117. Since the likelihood that vindictiveness would motivate increased sentences after a trial *de novo* was minimal, this Court found that the application of the *Pearce* prophylactic rule was inappropriate.

In *Chaffin* v. *Stynchcombe*, *supra*, this Court adopted a similar analysis in determining the applicability of *Pearce* to a two-tiered trial system in which the jury, rather than a judge, imposed sentence in the second stage. In its analysis of *Chaffin* in *Blackledge* v. *Perry*, this Court emphasized:

> [t]hat the second jury was completely unaware of the original sentence, and thus could hardly have sought to "punish" Chaffin for his successful appeal. Moreover, the jury, unlike a judge who had been reversed on appeal, could hardly have a stake in the prior conviction or any motivation to discourage criminal defendants from seeking appellate review.

Blackledge v. *Perry*, *supra*, 417 U.S. at 27. Thus finding "no basis for holding that jury resentencing poses any real threat of

vindictiveness," *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 28, this Court rejected *Pearce's* due process concept in this setting.

In *Blackledge* v. *Perry*, *supra*, this Court considered the merits of extending the rationale of *Pearce* to the exercise of prosecutorial discretion. In *Perry*, the accused invoked his statutory right to a trial *de novo* following his misdemeanor conviction in the lower court. The prosecutor immediately thereafter obtained a felony indictment which was founded on the identical conduct underlying the original misdemeanor charge. *id.* at 23. This Court eschewed any reliance whatsoever on the notion that the prosecutor had, in fact, acted vindictively but stated that "[t]he rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist." *id.* at 28. Stressing that due process is equally offended by the deterrent effect occasioned by the apprehension of such a retaliatory motivation, this Court declared *Pearce* apposite, stating:

> [A] person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the state will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

id.

Upon review of its earlier holdings, this Court in *Perry* recognized that the due process violation decried in *Pearce* arose not from the deterrent effect that the possibility of increased punishment may have upon the assertion of appellate rights, but from the deterrent effect of increased punishment that poses "a realistic likelihood of 'vindictiveness'." *id.* at 27. As stated by the court of appeals below, "the Supreme Court suggests only that a deterrent arising solely from the risk of higher punishment may be permissible while a deterrent arising from the risk of vindictiveness is not." Pet. App. 8a. Having

identified this essential criterion whose application warranted the adoption of the prophylaxis in *Pearce* but not in *Colten* or *Chaffin*, the *Perry* Court inquired "whether opportunities for vindictiveness in this situation are such as to impel the conclusion that the due process of law requires a rule analogous to that of the *Pearce* case." *id.* at 27.

In *Pearce*, this Court had found such "opportunities for vindictiveness" in the unexplained increase in punishment upon reconviction in the cases before it. Although left unsaid in this Court's opinion, later cases recognized that the hazard of retaliation derived substance from the apparent motive and ability of the sentencing tribunal to penalize the defendant for having successfully challenged his conviction. *See Colten* v. *Kentucky, supra*, 407 U.S. at 116-17; *Chaffin* v. *Stynchcombe, supra*, 412 U.S. at 26-28. Similarly, in *Perry*, this Court found that the requisite likelihood of vindictiveness inhered in the situation where a prosecutor, whose interest, or "stake," in the conservation of scarce prosecutorial resources and in the finality of a conviction is considerable, "has the means readily at hand to discourage such appeals — by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy. . . ." *id.* at 27-28. Grounded upon this prosecutorial motive and capacity for retaliation, this Court found a sufficient potential for vindictiveness in this context such that application of the *Pearce* due process rationale was necessary.

Thus, in a context presenting a realistic likelihood of prosecutorial vindictiveness, *Blackledge* v. *Perry* fully adopted a due process standard established in *Pearce* which assures the absence of actual retaliation, as well as a freedom from the apprehension of such a motivation. Given the inherent difficulties in assessing actual motivation on the part of a judge or prosecutor, *see North Carolina* v. *Pearce, supra*, 395 U.S. at 725, n.20, this Court has determined that application of a

prophylactic rule is the only effective means of implementing these requirements of due process. Accordingly, in a situation where a genuine hazard of retaliation exists, even an apprehension of vindictiveness must be adequately dispelled.

An interpretation of *Pearce* and *Perry* that conditions their applicability upon a finding of actual vindictiveness misconstrues this Court's approach.[6] It is the risk, as well as the actuality, of vindictiveness that evokes the due process considerations underlying the holding in these cases. Indeed, *Perry* expressly repudiated the notion "that actual retaliatory motivation must inevitably exist." 417 U.S. at 28. Therefore, the existence *vel non* of actual vindictiveness is not the touchtone of this Court's analysis; rather, the essential question is whether there is a genuine hazard of retaliation in the situation under review.[7]

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[6] *Moon* v. *Maryland*, 398 U.S. 319 (1970) does not hold to the contrary. *Moon* simply stands for the proposition that no issue as to the retroactive application of the constitutional standards of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), arises where there is no claim of vindictiveness on the part of the sentencing judge. *United States* v. *Gambert*, 433 F.2d 321, 323 n.5 (4th Cir. 1970).

[7] The remote or mere possibility of retaliation for the exercise of constitutional or statutory rights does not trigger application of the *Pearce/Perry* protective measure. For example, in *Koski* v. *Samaha*, 648 F.2d 790 (1st Cir. 1981), the defendant sought application of the *Pearce* rule to a prosecutor's increased sentencing recommendation in a *de novo* proceeding. Stating that sentencing is the province of the court and that, in any event, there are ample non-vindictive reasons for a particular sentencing recommendation, the court concluded "that for the prosecutor to recommend a higher sentence at the trial *de novo* does not necessarily reflect an attempt to penalize the defendant for utilizing the appellate process." *id.* at 797. Therefore, finding no real hazard of vindictiveness in this context, the court ruled that *Pearce* was inapplicable. *See also Chaffin* v. *Stynchcombe*, 412 U.S. 17, 27, n.13 (1973). *United States*, v. *Thurnhuber*, 572 F.2d 1307 (9th Cir. 1977), further illustrates this notion. There, the appellant contended that the bringing of two additional charges subsequent to his first trial which ended in the court's *sua sponte* declaration of a mistrial was improper as the product of prosecutorial vindictiveness. Although acknowledging that a defendant's

B. A Realistic Likelihood Of Vindictiveness Exists Where The Prosecutor, Whose Stake In Deterring The Exercise Of A Defendant's Right To A District Court Jury Trial Is Considerable, Substitutes More Serious Charges Only After That Right Was Invoked.

In the wake of this Court's decisions in this area of law, it is evident that *Pearce/Perry* considerations apply only when the "penalty," be it a higher sentence or the institution of more serious charges, presents a realistic likelihood of vindictiveness. Therefore, the threshold inquiry in this case is whether the particular factual situation presents a "realistic likelihood of vindictiveness" for the prosecutor's augmentation of the charges. *See United States* v. *Andrews, supra,* 633 F.2d at 453. The court of appeals properly focused on this question, stating that

> [u]nder *Blackledge,* we need not determine whether retaliation actually occurred in this case. It is enough that the circumstances surrounding the felony indictment give rise to a genuine risk of retaliation.

Pet. App. 6a. The majority concluded:

> Unlike the defendants in *Colten [v. Kentucky]* and *Chaffin [v. Stynchcombe],* but like the defendant in *Blackledge,* Goodwin faced increased charges brought by a prosecutor who had an incentive to deter misdemeanor defendants from exercising a right that would "require increased expenditures of" his own time. *Blackledge, supra,* 417 U.S.

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motion for a mistrial has been considered an exercise of a procedural right within the contemplation of the *Pearce* rule, no assertion of this, or any other, procedural right occurred in this case. Absent any exercise of a procedural right by the defendant, the prosecutor's action was manifestly not made in retaliation thereto. The court therefore concluded that the situation under review, absent some link between the exercise of the right and the "penalty," did not present a realistic likelihood of vindictiveness. *id.* at 1310. *Cf. United States* v. *Ricard,* 563 F.2d 45 (2d Cir. 1977) (*Pearce/Perry* claim rejected since there was nothing to warrant the conclusion that the defendant's decision to go to trial rather than plead guilty triggered the superseding indictment.)

> at 27, 94 S.Ct. at 2102. Thus, for defendant, and those similarly situated, "the danger that the [government] might be retaliating" is real. *Bordenkircher [v. Hayes], supra,* 434 U.S. at 363, 98 S.Ct. at 687.

Pet. App. 8a. Reasoned analysis supports the Fourth Circuit's holding.

1. The prosecutor clearly has a considerable stake in discouraging the defendant from obtaining a district court jury trial since such a trial involves the increased expenditures of prosecutorial resources.

This Court's prior holdings in this area offer a useful analytical framework for assessing the potential for vindictiveness in a given situation. In *Pearce, Colten, Chaffin,* and *Perry,* assertion of a procedural or statutory right resulted in more serious action being taken against the defendant, be it harsher resentencing after appeal or, as in *Perry,* the filing of more serious charges by the prosecutor. However, the crucial and, indeed, controlling, consideration is the incentive of the court or prosecutor taking the second and more severe action to discourage and/or penalize the defendant's exercise of his rights, and the ability to satisfy that motive.

Accordingly, in *Perry,* this Court concluded that a realistic likelihood of vindictiveness existed where the prosecutor had a "considerable stake" in deterring convicted misdemeanants from exercising their right to a trial *de novo,* as well as the means to "up the ante." This finding warranted the application of the *Pearce* due process rule. In contrast, this Court rejected the argument that the *de novo* court in *Colten* or the jury in *Chaffin,* each being the authority taking the second and more serious action, possessed the requisite retaliatory incentive. Finding neither to have a personal stake in discouraging the defendant's exercise of his rights nor a sensitivity to the institutional interests affected by the defendant's action, and emphasizing the likelihood that the second action was taken in ignor-

ance of the original action, this Court concluded that the potential for vindictiveness in these contexts was insufficient to invoke the *Pearce* due process rationale. See argument *supra* at 10-12.

As held by the court of appeals, see *supra* at 15-16, the instant case closely tracks the circumstances in *Perry* which supported the finding of a realistic likelihood of vindictiveness.[8] While an interest in maintaining the finality of a conviction is not implicated in the present case, there nevertheless exists a substantial prosecutorial incentive to discourage defendants charged in magistrate's court from exercising their right to a jury trial before a district court judge. First, a prosecutor handling the district court case will undoubtedly be aware of the original action that had been taken against the defendant, thus immediately distinguishing this situation from that presented in either *Colten* or *Chaffin*. Second, the prosecutor has a personal stake to the extent that his time and effort would not be required if the case remained at the magistrate level, a situation analogous to that presented in *Perry* if no trial *de novo* had been requested. Third, the request for a jury trial at the district court level will require the expenditure of prosecutorial resources greatly in excess of that required by a court trial before the magistrate. There are definite costs that attend a jury trial in terms of both time and money that simply are not incurred if the

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[8] Indeed, while generally described as involving the defendant's statutory right to appeal, the circumstances in *Perry* actually pertain to, as does the present case, the defendant's Sixth Amendment right to a jury trial. In the North Carolina two-tiered system, applicable in *Perry*, a jury trial was not available until the trial *de novo* in superior court. The defendant's exercise of his statutory right to a trial *de novo* was, in effect, an exercise of his right to a jury trial. Therefore, the prosecutorial interest in discouraging the assertion of such a right in *Perry* — one which this Court found to be "considerable" — is implicated in the case under review.

case proceeds before a magistrate for a court trial.[9] These costs represent definite institutional interests to which the prosecutor is highly sensitive.

Thus, it is clear that a defendant accused of misdemeanor and petty offenses is confronted by an adversary with a "considerable stake" in deterring the exercise of his right to a trial by jury. As in *Perry*, the prosecutor possesses the motive and the means to "insure that only the most hardy defendants will brave the hazards" . . . , 417 U.S. at 28, of exercising their right to a district court jury trial.

2. Where more serious charges based on the same conduct underlying the original charges are brought, the realistic likelihood of vindictiveness is heightened.

A claim of vindictiveness arising from the institution of more serious charges represents a direct challenge to the exercise of prosecutorial discretion. Thus, in assessing the risk of vindictiveness posed by such action, a determination of the nature and proper scope of prosecutorial discretion in this context is necessary.

It is well settled that prosecutors must be accorded great latitude in the discharge of their charging authority:

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and

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[9] In *Santobello* v. *New York*, 404 U.S. 257, 260 (1971), this Court stated that "if every criminal charged were subjected to a full-scale trial, the State and Federal Government would need to multiply by many times the number of judges and court facilities." Although referring to the savings of resources as a result of plea bargaining, this observation is equally apt here where the enormous practical difference between a full-blown district court jury trial and a magistrate's court trial is highly significant.

> what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Bordenkircher v. *Hayes, supra,* 434 U.S. at 364 (footnote omitted). The scope of the proper exercise of prosecutorial discretion includes the unfettered freedom to determine at the outset of a criminal case which statute will be invoked to charge a particular criminal act. However, once this determination has been made and a prosecution instituted, the prosecution's interest in its unfettered discretion has been satisfied.

Thus, the substitution of a more serious charge based on identical criminal conduct underlying the original charge simply does not implicate the prosecution's strong interest in preserving its legitimate discretion to initiate charges for that conduct. Instead, substitution presents the very real possibility that the exercise of such discretion has been improperly motivated by the desire to discourage or penalize the assertion of procedural rights, action clearly outside the proper scope of prosecutorial discretion.

Indeed, several circuits have recognized the diminished discretion afforded the prosecution when it attempts the substitution of more serious criminal charges. *See, e.g., United States* v. *Andrews, supra,* 633 F.2d at 454; *Lovett* v. *Butterworth,* 610 F.2d 1002, 1007 (1st Cir. 1979), *cert. denied,* 100 S.Ct. 3038 (1980); *Jackson* v. *Walker,* 585 F.2d 139, 145-6 (5th Cir. 1978). In resolving issues of prosecutorial vindictiveness, these courts have espoused a balancing approach which weighs the defendant's interest in freedom from retaliation for the exercise of procedural rights against the prosecution's interest in the exercise of its discretion. The crucial distinction between the addition of charges as contrasted with the substitution of charges, which is based on the premise that the prosecution has

not previously exercised its discretion as to the subsequently added charges, often controls this balancing process.[10]

Accordingly, these courts have sanctioned the addition of more serious charges, thus deferring to the prosecutorial interest in the unhampered exercise of its authority to institute charges based on different and distinct criminal activity. *See, e.g., Hardwick* v. *Doolittle, supra; Jackson* v. *Walker, supra.* These courts also recognize that the substitution of charges, that is, the institution of more serious charges based on the identical conduct underlying the original charges, does not invoke this broad policy of prosecutorial discretion. *See, e.g. Lovett* v. *Butterworth, supra; Miracle* v. *Estelle,* 592 F.2d 1269 (5th Cir. 1979). The interest in the unfettered exercise of prosecutorial discretion having been satisfied by the prosecutor's original charging decision, the further action of substituting more serious charges is naturally and appropriately suspect:

> Absent an explanation encompassing factors unknown or non-existent at the time the original decision was made it could fairly be assumed that the sole factor intervening between such decision and a shift to a more punitive position — the defendant's exercise of a protected right — played a part in the determination. Hence, a reasonable apprehension of the realistic likelihood of vindictiveness might arise.

United States v. *Andrews,* 612 F.2d 235, 246 (6th Cir. 1979). *See also, United States* v. *Andrews, supra,* 633 F.2d at 454.

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[10] This addition/substitution distinction which is often relied upon by the courts in resolving issues of prosecutorial vindictiveness is based on the faulty premise that the decision to not prosecute for particular criminal conduct is not an exercise of prosecutorial discretion. To the contrary, such inaction is often a very appropriate exercise of prosecutorial discretion. That this basic distinction is flawed, however, does not detract from the proposition that the substitution of charges implicates a lesser interest in the exercise of prosecutorial discretion.

C. The Realistic Likelihood Of Vindictiveness Is Not Obviated Merely Because The Challenged Action Occurred During The Pre-Trial Stage Of The Criminal Proceeding.

The petitioner urges that "[i]n the pre-trial stage of a criminal prosecution, . . . the special prophylactic rules fashioned in *Pearce* and *Perry* have no legitimate application . . ." Pet. Brief at 14. Such a position is unprecedented in federal case law and reflects a simplistic and illogical approach to resolving issues of prosecutorial vindictiveness.

As emphasized above, the central issue to be resolved is whether the circumstances under review pose a realistic likelihood of vindictiveness. Where such a likelihood exists, due process of law requires application of a rule analogous to that fashioned in *Pearce*. Relevant to this inquiry are several factors including the nature of the right asserted by the defendant, the prosecutor's knowledge, the nature and timing of the response by the prosecutor, his incentive to discourage the assertion of the defendant's rights, and the institutional interests that may be relevant. Certainly, these factors may be different in nature, and accorded greater or lesser consideration in an assessment of potential vindictiveness, depending upon the procedural context in which the issue has arisen. However, while the stage of the criminal proceeding is thus indirectly relevant, the pre-trial/post-trial distinction is not *per se* determinative of the issue, as erroneously suggested by the petitioner.

Although *Pearce* and *Perry* deal with post-conviction rights and retaliatory responses to their assertion, nothing in those opinions explicitly confines their due process considerations to the post-trial setting. Indeed, the *Pearce* due process rationale has been adopted in a pre-trial context in numerous cases, which at least implicitly acknowledges the propriety of such application. *See, e.g.,United States* v. *Currie*, 653 F.2d 1300 (9th Cir. 1981) (court of appeals held that superseding indictment was a vindictive response to defendant's decision to stand

trial); *United States* v. *Hollywood Motorcar Co.*, 646 F.2d 384 (9th Cir. 1981), petition for cert. pending, No. 81-1144 (filed Dec. 17, 1981) (court upheld claim that a superseding indictment was a vindictive response to a motion to change venue); *United States* v. *Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976) (appellate court held that superseding indictment was a vindictive response to demand to be tried before a district judge); *United States* v. *Velsicol Chemical Corp.*, 498 F.Supp. 1255 (D.C. Cir. 1980) (district court held that new charges were a vindictive response to the defendant's *nolo contendere* plea). In those cases holding invalid claims of vindictive prosecution arising in the pre-trial setting, the pre-trial/post-trial distinction was not the fatal variable. Rather, it was the absence of the realistic likelihood of vindictiveness which undermined the charge of prosecutorial misconduct. *See, e.g. United States* v. *Burt*, 619 F.2d 831 (9th Cir. 1980) (appellate court rejected claim that federal charge was vindictive response to suppression motion in state court); *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir. 1980) (court denied claim that superseding indictment was a vindictive response to motion to dismiss first indictment); *United States* v. *Sturgill*, 563 F.2d 307 (6th Cir. 1977) (court rejected claim that new charges were a vindictive response to defendant's assertion of right to district court jury trial since defendant was not subjected to more severe charges).

The petitioner's flat rejection of any application of the *Pearce/Perry* rule to a pre-trial context is based solely on the dissenting opinion in the *en banc* decision in *United States* v. *Andrews, supra*, 633 F.2d 449. [11] Judge Merritt employed the somewhat anomalous reasoning that the due process rationale developed in *Pearce* was designed solely to satisfy double jeopardy interests which had been unfulfilled due to this Court's

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[11] Petitioner also relies on the decision of the New Mexico Supreme Court in *State* v. *Stevens*, 96 N.M. 627, 633 P.2d 1225 (1981), which heavily relies on the *Andrews* dissent.

holding that the double jeopardy provision did not bar a harsher sentence upon reconviction. *id.* at 458-59. Based on this patently illogical premise, Judge Merritt concluded that the prophylactic rules of *Pearce* and *Perry* do not apply to pre-trial stage where double jeopardy values are not implicated.

Judge Merritt's analysis is simply ill-conceived given this Court's unequivocal rejection of a double jeopardy proscription in the *Pearce* context. *North Carolina* v. *Pearce, supra,* 395 U.S. at 723. Moreover, this analysis ignores the due process rationale underpinning *Pearce* and *Perry* which requires an application of the prophylactic measure only where there exists a realistic likelihood of vindictiveness. This concept is the essence of the *Pearce* ruling and Judge Merritt's failure to acknowledge this controlling idea manifests the basic fallacy of his position and that adopted by the petitioner.

The majority in *Andrews* recognized this proper inquiry, and rejected any absolute pre-trial/post-trial distinction:

> [W]e cannot accept the Government's argument that the prosecutorial stake in a pre-trial setting is always so *de minimis* that there can never be a "realistic likelihood of vindictiveness" in a pre-trial setting. Each situation will necessarily turn on its own facts.

id. at 454.

Analytically, therefore, there is no basis whatsoever for confining the *Pearce/Perry* principle to the post-trial stage of a criminal proceeding. Nevertheless, petitioner urges this Court to hold that the adversarial nature of the pre-trial stage of a criminal case precludes application of the *Pearce/Perry* prophylaxis since such a context does not afford sufficient "opportunities for vindictiveness". Pet. Brief at 30. To the contrary, it is precisely the volatile nature of the pre-trial stage which offers substantial opportunities for retaliatory conduct by a prosecutor. Indeed, the need for a prophylactic measure that confines prosecutorial action to the bounds of due process is

most acute at this stage, a stage where an improperly motivated prosecutor can take great advantage of the adversarial process. To reject any application of the *Pearce/Perry* rule to the pre-trial stage is to ignore this clear potential for an abuse of prosecutorial power:

> While it is true that a prosecutor always has a considerable stake in avoiding the cost and inconvenience of a trial, a prosecutor often has a similar motivation to deter the exercise of Constitutional or statutory rights where something other than a full retrial is involved. To the extent that the exercise of a right in some way decreases the likelihood of conviction or makes a prosecutor's job more burdensome, the prosecutor has an incentive to deter the exercise of that right.

United States v. *Andrews, supra,* 612 F.2d at 248 (Keith, C.J., dissenting).

The analysis of the applicability of *Pearce* and *Perry* to the pre-trial stage reveals the basic policy considerations underlying issues of prosecutor vindictiveness. This Court responded to claims of prosecurtorial vindictiveness by fashioning a prophylactic measure that accommodated the well-settled policy of broad prosecutorial discretion with the due process constraint that defendants be free from retaliation on the part of the government for the exercise of their rights, or the apprehension thereof. The rule was designed to afford that due process protection only in those limited contexts presenting a genuine risk of vindictiveness, and to allow the opportunity to justify the apparent impropriety. Petitioner's expressed concerns that application of this doctrine in the pre-trial setting will unduly burden the criminal justice system, particularly the exercise of prosecutorial discretion, are unfounded.

The due process protection versus prosecutorial discretion balance established in *Pearce* and *Perry* is appropriately applied in the pre-trial setting. To be sure, not every confrontation between the defense and prosecution, an admittedly frequent

occurrence at the pre-trial stage, will warrant application of this doctrine. Consistent with this Court's analysis, however, a presumption of retaliation will arise when there exists a reasonable likelihood of vindictiveness. This prophylactic measure does not unduly burden or interfere with the proper exercise of prosecutorial discretion. Only rarely will the prosecutor's response to a defendant's routine exercise of procedural rights at the pre-trial stage engender the likelihood of vindictiveness. In that event, due process requires appropriate limitation. Moreover, contrary to the petitioner's repeated assertions, a prosecutor is not unreasonably bound to its initial charging decision where changed circumstances support and legitimize further prosecution. See argument, *infra* at 34, n.15. [12] Such objective and explicit justification for further charges was specifically contemplated by this Court in *Pearce* and *Perry*.

The petitioner asserts that the inevitable effect of applying the prophylactic measure in the pre-trial context is that prosecutors will bring the most severe charges possible at the outset of the case. It is difficult to understand the burden posed by such a procedure given its endorsement as a sound prosecutorial policy in the recently promulgated *Principles of Federal Prosecution*. It is stated therein that "the attorney for the government should charge . . . the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." Part C. 1, *Principles of Federal Prosecution*, United States Department of Justice, July, 1980. In any event, proper prosecutorial procedure, not overindictment, is the indicated response to the permissible burdens imposed by the Due Process Clause. In the instant case, the failure to

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[12] At several points in its brief, petitioner notes that the prosecutor often engages in pre-trial investigation during which he receives new information about the accused. Pet. Brief at 21, 30, 44. Any misgivings held by the petitioner that, in such event, additional charges would be precluded, are baseless. Such charges would clearly be appropriate under *Perry*.

originally charge the respondent with the most serious crimes possible was the result of improper prosecutorial procedure. There existed both the opportunity to review the case against the respondent as it had been initiated, as well as the opportunity to reassess the propriety of the current charges. In light of the prosecution's apparent willingness to proceed to trial before the magistrate, the prohibition against prosecuting the respondent on greater charges is a direct result of an exceedingly poor performance of the prosecutorial function.

Finally, it is no answer to suggest that the application of the *Pearce/Perry* doctrine in a pre-trial context is too difficult. Certainly, the assessment of a reasonable likelihood of vindictiveness is not susceptible to bright line analysis, and necessarily rests on the totality of the circumstances in each case. However, the mere difficulty of its application does not justify the abandonment of a prophylactic rule which implements fundamental due process considerations.

D. Prosecutorial Vindictiveness Has Been Condoned Only In The Narrow Context Of Plea Bargaining.

In *Bordenkircher* v. *Hayes, supra,* the defendant was initially charged with forgery. In the course of plea negotiations, the prosecutor explicitly threatened the defendant with prosecution as a habitual offender, a charge carrying a mandatory life sentence, if the defendant refused to enter a guilty plea on the forgery charge. When the defendant persisted in pleading not guilty, the prosecutor brought the more serious charge upon which the defendant was ultimately convicted. Although actual vindictiveness was clear on the record in *Bordenkircher,* this Court held that such retaliatory action by the prosecutor did not violate due process of law.

The petitioner's reliance on *Bordenkircher* is misplaced, erroneously attributing to its holding a breadth expressly disclaimed by the opinion itself. Indeed, the petitioner's unduly

restrictive interpretation of *Pearce* and *Perry* stands in stark contrast to its expansive interpretation of this Court's holding in *Bordenkircher*. There, this Court addressed the narrow question whether due process of law is offended when a prosecutor, during plea negotiations, threatens an accused with more serious charges if he does not plead guilty to the original charge, and subsequently carries out that threat. Analogizing that situation to one where the accused was originally indicted to the fullest extent possible and the prosecutor offered to drop the most serious charge as part of a plea agreement, this Court's opinion is a strong affirmation of the legitimacy and necessity of plea bargaining.

This Court recognized that a threat of more severe punishment which necessarily attends plea negotiations deters the assertion of the defendant's rights. However, this Court characterized these punitive aspects inherent in plea bargaining as inevitable and permissible "attributes of any legitimate system which tolerates and encourages the negotiation of pleas," *id.*, quoting *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 31, and further stated that "this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." *ibid.* Once established, this principle validates prosecutorial action designed to induce a guilty plea. This Court concluded:

> We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause.

Bordenkircher v. *Hayes*, 434 U.S. at 365.

In so holding, this Court acknowledged the authority of *Pearce* and *Perry* which proscribes "the State's unilateral im-

position of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction," *id.* at 362, but described that situation as "very different from the give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power." *ibid.* quoting *Parker* v. *North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.). While reaffirming the notion that "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional,' " *id.* at 363, this Court concluded:

> But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

ibid. Thus, *Bordenkircher* is simply "a unique case where a prosecutor acted vindictively, but an independent factor — the defendant's ability to chose — eliminated any due process problems." *United States* v. *Andrews*, 633 F.2d at 457.

Bordenkircher neither undermines nor modifies the *Pearce/Perry* rationale if its holding is recognized, as it must, to be firmly grounded upon this Court's express determination that plea bargaining is an essential and legitimate component of the administration of the criminal justice system. Rather, "their [*Pearce* and *Perry*] basic legitimacy is affirmed even though the Court holds that they are misapplied in the context of plea bargaining." Note, *Prosecutorial Vindictiveness and Plea Bargaining: What are the Limits? — Bordenkircher* v. *Hayes*, 27 DePaul L.Rev. 1241, 1255 (1978). This analysis unquestionably distinguishes *Bordenkircher* from the Court's rulings in *Pearce* and *Perry*, and precludes its applicaton to the present matter. Moreover, in *Bordenkircher*, Mr. Justice Stewart's

delineation of the precise issue before the Court was clear and unambiguous:

> The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.
>
> * * *
>
> It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. *This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty.*

id. at 358, 360 (emphasis supplied) (footnoted deleted).

The factual setting unequivocally excepted from the holding in *Bordenkircher* is now before this Court. On May 24, 1979, the respondent was returned to the magistrate's court in Hyattsville for trial on the petty offense and misdemeanor charges pending against him. Prior to his appearance, his counsel approached the prosecuting attorney and inquired about the possibility of a plea agreement. She expressed some interest; however, any communication reasonably characterized as plea negotiations was abruptly terminated by the respondent who informed his attorney of his desire for a jury trial. During the brief discussion among the parties, there was no reference whatsoever made to the possibility that the respondent could face additional and more serious charges if he elected a jury trial. (J.A. 26).

Thus, it is clear that the petitioner's reliance upon *Bordenkircher* is misplaced. Indeed, this Court expressly declined to apply its holding in *Bordenkircher* to the present facts. That decision, which carefully resolves any apparent conflict with *Pearce* and *Perry*, employs a rationale manifestly inapplicable to the present case where there was none of the "give-and-take" of plea bargaining and the respondent had absolutely no notice of the possibility that more serious charges would be instituted upon his election of a jury trial.

The absence of any meaningful plea negotiations in the instant case also undermines the petitioner's reliance upon this Court's decision in *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978). There, this Court found no impermissible element of punishment within a statutory scheme which authorized more lenient sentences for defendants who pled *non vult* in homicide cases. Under the New Jersey homicide statute, a sentence of life imprisonment is mandatory for defendants convicted by a jury of first-degree murder. Although court trials or guilty pleas are precluded by statute, a plea of *non vult* is allowed which, if accepted by the court, authorized up to life imprisonment but does not require it. Relying upon *United States* v. *Jackson*, 390 U.S. 570 (1968),[13] the defendant contended that because one who declines to stand trial can receive a lesser term, the mandatory life sentence he received upon conviction unconstitutionally burdened his right to a jury trial.

This Court rejected the defendant's argument. Emphasizing "that not every burden on the exercise of a constitutional right,

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[13] In *Jackson*, this Court held that the death sentence provided by the Federal Kidnapping Act was invalid because it could be imposed only upon those defendants insisting on a jury trial, whereas the maximum penalty for those convicted after a court trial or upon a guilty plea was life imprisonment. This Court concluded that this statute created an unconstitutional condition that needlessly punished the right to plead not guilty and to demand a jury trial.

and not every pressure or encouragement to waive such a right, is invalid," *id.* at 218, this Court reaffirmed the legitimacy of plea bargaining despite its imposition of difficult choices upon defendants. The fact that the defendant sacrificed any possibility of leniency if he went to trial was compared to the situation in *Bordenkircher* where the defendant's desire to go to trial resulted in a more serious charge. As in *Bordenkircher*, this Court found no impermissible element of retaliation or vindictiveness " 'so long as the accused [was] free to accept or reject the choice presented to him by the State," id. at 225, quoting *Bordenkircher* v. *Hayes*, 434 U.S. at 360, stating:

> There is no doubt that those homicide defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed.

id. at 223-24.

The facts of the present case simply do not permit this fundamental reliance upon the legitimacy of plea bargaining that characterizes this Court's decisions in *Bordenkircher* and *Corbitt*. The petitioner's position that these decisions control the present case represents an unwarranted extension of their narrow holdings, and was expressly disavowed by this Court in *Bordenkircher*. This case does not present the proper use by the prosecutor of available leverage in the plea bargaining process or the legitimate imposition of difficult choices upon a defendant. Rather, the action taken against the respondent in this case was the constitutionally impermissible exercise of the government's power to initiate prosecution as proscribed by *Blackledge* v. *Perry*.

II. APPLICATION OF THE *PEARCE/PERRY* PROPHYLACTIC RULE TO THIS CASE REVEALS A FUNDAMENTAL VIOLATION OF DUE PROCESS OF LAW BECAUSE THE PROSECUTOR'S SUBSTITUTION OF CHARGES AFTER THE RESPONDENT HAD EXERCISED HIS RIGHT TO A JURY TRIAL WAS NOT JUSTIFIED BY ANY INTERVENING CONDUCT OR CIRCUMSTANCES.

Pearce and *Perry* manifestly support the court of appeals' finding that the reasons proffered by the prosecutor in justification of the increased charges failed to dispel the realistic likelihood of vindictiveness presented in this case.

A. The *Pearce/Perry* Rule Requires That The Initiation Of More Serious Charges Be Justified By Identifiable Conduct On The Part Of The Respondent Occurring Subsequent To The Exercise Of His Right To A Jury Trial.

In *Pearce*, this Court directed that the imposition of a more severe sentence after a new trial must be justified by "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726. Although undoubtedly mindful of the distinct possibility that information concerning the defendant's conduct prior to the first sentencing may not surface until subsequent to that proceeding, *Pearce* expressly held that such information cannot supply the basis for an enhanced sentence. [14]

The precision with which this Court in *Pearce* fashioned its standard reflects its concern that even the appearance of vindic-

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[14] This Court's language permits no other conclusion, as implicitly acknowledged by Mr. Justice White's concurrence wherein he disagreed with the majority's limitation, but stated his approval of "an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding." *North Carolina v. Pearce*, 395 U.S. 751.

Also of relevance here is this Court's comments which endorse "[t]he freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence . . ." *id.* at 723.

tiveness be minimized. Where the harsher sentence follows only the assertion of appellate rights, an element of vindictiveness, and certainly its appearance, is much more likely to be perceived. In other words, if the sole additional factor known to the sentencing judge upon reconviction is the exercise of a procedural right, it is hardly unreasonable to infer that that exercise prompted the increased punishment. Therefore, prohibiting enhanced sentences upon reconviction in all but those cases where such a sentence is warranted by conduct subsequent to the initial imposition of sentence significantly reduces the chance that the increased punishment was a result of retaliation, or even afforded such an appearance.

In holding that "it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*," *Blackledge* v. *Perry*, *supra*, 417 U.S. at 28-29, this Court adopted and applied to the issue of prosecutorial vindictiveness the prophylactic rule fashioned in *Pearce*. Although not explicitly incorporating the aspect of the *Pearce* holding which stated the possible justification for an enhanced sentence, the *Perry* court nevertheless made apparent its total affirmance of this principle.

This Court specifically stated that the indictment obtained by the prosecutor after the filing of the notice of appeal was based on the identical conduct for which Perry had been prosecuted in the lower court. Thus, the substitution of charges followed only the exercise of his right to a trial *de novo*, and was not the result of newly discovered evidence or new information otherwise pertaining to the prosecutorial charging decision. Absent such intervening justification, this Court perceived "opportunities for vindictiveness" which warranted the application of the *Pearce* due process rule. This Court qualified its holding, however, as it had in *Pearce*, by stating that "this would clearly be a different case if the State had shown it was impossible to

proceed on the more serious charge at the outset. . . ." *id.* at 29. Thus, this Court acknowledges the propriety of increased charges only if justified by circumstances arising subsequent to the decision to proceed on the original charges. [15]

Numerous courts have had little difficulty in applying the *Pearce/Perry* prophylactic measure, as qualified by the aforementioned caveat. Those cases have upheld the claims of prosecutorial vindictiveness emphasizing, indeed, relying upon, the fact that at the time of the original charge, the prosecutor was aware of the basic facts or events supporting the subsequent, more serious, charges. For example, in *United States* v. *Ruesga-Martinez, supra,* the defendant had been arraigned before a magistrate on a misdemeanor charge of unlawful entry, in violation of 8 U.S.C. § 1325. Subsequent to his refusal to consent to be tried by the magistrate, the defendant was charged in a two-count indictment with felony violations of 8 U.S.C. §§ 1325, 1326. Finding that the increase in the severity of the charges created a sufficient appearance of vindictiveness to call into play the holdings of *Pearce* and *Perry,* the court sought a legitimate basis for such action. It found none, stating:

> The prosecution attempts to justify its conduct by emphasizing that there was more than ample evidence that appellant was a multiple offender. This does not in itself justify an increase in the severity of the charges in the second proceeding because that evidence was known to the prosecution before it brought the original lesser charge. . . . In the present case, the only new facts alleged in the felony indictment were appellant's previous arrests, conviction, and deportation. There can be no doubt that such facts

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[15] Increased charges are justifiable under several circumstances, such as the receipt of additional information through ongoing investigation, *see, e.g., United States* v. *Griffin,* 617 F.2d 1342, 1348 (9th Cir. 1980); *United States* v. *Jamison,* 505 F.2d 407, 417 (D.C. Cir. 1974), and previous legal impossibility, *Blackledge* v. *Perry, supra,* 417 U.S. at 29, n.7.

> were known to the prosecution before it initiated the original complaint.

id. at 1370. The court upheld the appellant's claim of prosecutorial vindictiveness. *See also United States* v. *Alvarado-Sandoval*, 557 F.2d 645, 646 (9th Cir. 1977).

Similarly, in *United States* v. *Johnson*, 537 F.2d 1170 (4th Cir. 1976), the Fourth Circuit held that the defendant's prosecution on increased charges subsequent to his appeal of a previous conviction denied him due process of law. In applying the *Perry* rationale, the court noted that the prosecution was ready to proceed to trial on the original indictment and that it was aware of all of the facts essential for the increased charges prior to the defendant's assertion of his appellate rights. Further, no new evidence was discovered between the original conviction and the new charges which could justify the increase. Other courts have recognized the critical importance of this factor and upheld the claims of prosecutorial vindictiveness. *See, e.g., Miracle* v. *Estelle*, 592 F.2d 1269, 1276 (5th Cir. 1979); *United States* v. *DeMarco*, 550 F.2d 1224, 1226 (9th Cir. 1977); *United States* v. *Jamison*, 505 F.2d 407, 416-17 (D.C. Cir. 1974).

However, other courts — in disregard of the need for explicit justification for increased charges — have suggested that claims of inadvertence, *Hardwick* v. *Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977), inexperience, *United States* v. *Andrews*, *supra*, 633 F.2d at 456, or a different approach by a successor prosecutor, *United States* v. *Ricard*, 563 F.2d 45, 48 (2d Cir. 1977), are sufficient to rebut a charge of vindictiveness. Given this Court's articulated concern that defendants be free of the apprehension of vindictive motivation on the part of the prosecution, such an approach is grossly inappropriate.

Pearce and *Perry* expressly repudiated any requirement that actual vindictiveness be demonstrated, finding that "[t]he existence of a retaliatory motivation would be extremely difficult to

prove in any individual case." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 725, n.20. Recognizing the problems that would permeate a process whereby the actual motives and subjective intent of a court or prosecutor are scrutinized, this Court reasoned that the most effective means of policing vindictive action is to proscribe, with limited exceptions, those situations giving rise to a realistic likelihood of vindictiveness. As stated by the court of appeals in this case:

> [*Perry*] adopts a prophylactic rule designed to spare courts the unseemly task of probing the actual motives of the prosecutor in cases where objective circumstances suggest a realistic possibility of vindictiveness.

Pet. App. 9a. A willingness to accept prosecutorial excuses of inadvertence or mistake, or other subjective good faith assertions, in rebuttal of a realistic likelihood of vindictiveness is directly opposed to the policy considerations that give substance to the *Pearce*/*Perry* due process measure, and vitiates its prophylactic impact.

The rule propounded by this Court in *Pearce* and *Perry* represents the accommodation of legitimate but competing interests in the free exercise of prosecutorial discretion and the due process right of an accused to pursue procedural rights without fear of retaliation. While such a rule necessarily limits prosecutorial discretion to some degree, the restraint is narrowly confined to do no more than is required by due process, that is, to assure an absence of vindictiveness or an appearance thereof. *Perry* clearly recognizes that "enhanced charges are frequently required because the prosecutor received new information about the accused during the course of trial preparation," Pet. Brief at 44, and, contrary to the petitioner's assertion, does not restrict a prosecutor from acting upon that information. See *supra* at 25. The rule does not otherwise deny the opportunity to justify increased charges, but only requires a justification that satisfies its underlying purpose. Thus, while preserving the due process interest in freedom from retaliation

for the exercise of a procedural right, the prophylactic rule applicable in this case is nevertheless "sufficiently flexible to accommodate the legitimate needs of the prosecutor in exercising charging discretion." Pet. Brief at 44.

B. The Prosecutor's Explanation Is Founded On Information Well Known To The Government Prior To The Respondent's Exercise Of His Right To A Jury Trial, And Is Insufficient To Rebut The Realistic Likelihood of Vindictiveness Present In This Case.

The Petitioner argues that the prosecutor sustained his burden of rebuttal in this case by his "investigation of respondent during pretrial preparation, which occurred after the case was transferred to him from another prosecuting attorney." Pet. Brief at 46. The position fundamentally misconceives the nature of the justification that must be advanced by the prosecutor pursuant to *Pearce* and *Perry*. See discussion *supra* at 32-37. Moreover, petitioner glibly ignores the simple, but crucial, fact that all the grounds it relies upon in attempting to justify the increased charges in this case were known to the prosecution prior to the respondent's request for a jury trial on May 24, 1979:

First, the prosecuting attorney had the opportunity, prior to appearing in court in this matter, to read the incident report filed by Officer Morrissette and to speak with this officer about the offenses. Thus, the prosecution was well aware of the facts underlying the charge and the seriousness of the crime. (J.A. 25-26).

Second, the prosecution was aware of the respondent's history of violent crime through Officer Morrissette who, months earlier in February, 1979, had attended the respondent's state trial on charges of possession of heroin with the intent to distribute and the attempted unlawful shooting of a police officer. (Pet.App. 29a). In addition, the magistrate's court file contained a copy of the respondent's F.B.I. record which reflected his lengthy history of violent crime. (J.A. 6).

Third, the prosecution was then aware of information which directly supported an inference that the respondent's illegal conduct on February 2, 1976, was related to narcotics trafficking. Subsequent to February 2, 1976, Officer Morrissette had contacted various law enforcement authorities and learned that the respondent was thought to be a major heroin dealer, and was associated with individuals who smuggled heroin into the United States utilizing airfields in Florida, Georgia and Maryland. (Pet.App. 28a). The prosecution's knowledge of the respondent's conviction for heroin trafficking in Virginia is also relevant in this regard. (Pet.App. 29a).

Fourth, any basis for the allegation that the respondent had committed perjury at the preliminary hearing on March 30, 1976, was established and well known to Officer Morrissette and, therefore, to government counsel, substantially prior to May 24, 1979.

Fifth, the prosecution was obviously aware of the respondent's failure to appear for trial scheduled for April 29, 1976, given the protracted delay in the proceedings, as well as the pendency of that charge.

It is readily apparent that the increased charges in the present case did not rest on changed circumstances or newly discovered evidence arising subsequent to the prosecution's decision to proceed to trial on the lesser charges and the respondent's election of a jury trial. On the contrary, the proffered justification is based solely on information already in the possession of the government at the time of the respondent's appearance before the magistrate. It bears emphasizing that Officer Morrissette, from whom prosecutor Norton obtained the substantial portion of his information, was also the source of information for prosecutor Bruce and had conducted his investigation months prior to the May 24, 1979, trial date. Indeed, even the United States Attorney's Office in Baltimore had a prior awareness of the respondent's case, including information pertaining

to the nature of the pending charges and the crimes for which he was convicted in Virginia state court. (Pet.App. 25a-27a).

Thus, despite knowledge of the seriousness of the alleged offenses; of the respondent's history of violent crime and involvement in narcotics trafficking; of his possible perjury before the magistrate; and his failure to appear for trial, the prosecution on May 24, 1979, was content to proceed against the respondent on the pending petty offense and misdemeanor charges, and would have done so but for his exercise of his constitutional right to a jury trial.

Contending that the events in this case are not suggestive of vindictiveness, the petitioner emphasizes the inability of either Officer Morrissette or Ms. Bruce to obtain a felony indictment. (Pet. Brief at 42). This argument, which merely states the obvious, is specious. The prosecution of the respondent was assigned to Ms. Bruce who, as a representative of the United States Attorney's Office, could readily enlist the aid of that office. Neither the record in this case nor common sense suggests that the prosecutor was absolutely required to proceed to trial immediately upon the respondent's return to the District of Maryland, as opposed to calling the case merely for an initial appearance, seeking a brief continuance or otherwise holding the matter in abeyance. There existed ample opportunity prior to trial to reassess the propriety of proceeding against the respondent on the original charges, and only a brief phone call was needed to obtain further advice on the matter.

The petitioner asserts that a failure to reindict the respondent would have been "a dereliction of duty" under the circumstances of this case. (Pet. Brief at 48). Rather, it was the magistrate court prosecutor's failure to take appropriate action in response to the situation presented to her that was grossly inadequate. However, the prosecution once having decided to proceed to trial on the pending charges, its legitimate interest in the free exercise of its charging authority did not permit repeat-

ed determinations to institute charges without regbard to the respondent's due process rights.

The petitioner dismisses the possibility of vindictiveness on the basis that the increased charges were a proper result of a reevaluation of the case which had been brought by a law enforcement officer. (Pet. Brief at 42). While it is clear that the original charges in this case were brought by Officer Morrissette by criminal complaint, the prosecutor's ability to review, reconsider or reject those charges was intact. The role of the magistrate court prosecutor can only be assumed to include a proper review of the evidence and of the charges set by an officer. If prosecutorial decisions are, in reality, finalized by law enforcement officers, it will be the result of an abdication of the prosecutorial function by those assigned to carry it out. If the government chooses to administer magistrate court prosecutions in such a way as to entrust the final charging decision to such officers and/or part-time, specially assigned "prosecutors," it assumes the risk of whatever ill-advised action its representative may take. The appropriate response to such a situation is the proper administration of the prosecutorial function at the magistrate's level, not the sacrifice of the essential due process protection against the actuality or apprehension of vindictiveness.

The case under review presents unique circumstances where, subsequent to his exercise of his constitutional right to a jury trial, the respondent was subjected to increased charges based upon information known to the prosecution prior to the invocation of his rights. Although possessing the facts which ultimately supported the more serious charges, the prosecution was content to proceed to trial on the original petty offense and misdemeanor charges, and indicted the respondent only after his election of a jury trial and in the absence of any intervening justification. Given the realistic likelihood of vindictiveness attending these events, an application of the *Pearce/Perry* due process rationale is warranted.

As in *Perry*, the record in this case does not disclose actual vindictiveness, and none is claimed by the respondent. However, the relevance of the *Pearce/Perry* prophylaxis is not conditioned upon a finding of actual retaliation, but is required where a realistic likelihood of vindictiveness exists. The petitioner's repeated emphasis of the absence of actual vindictiveness, *see* Pet. Brief, Argument II.B., does not justify a distortion of the due process analysis established by this Court and of the fundamental purpose of this prophylactic measure.

Appropriately limited to the peculiar facts under review, this Court's adoption of the *Pearce/Perry* rule in this case will not promote an unwarranted interference with the proper exercise of prosecutorial discretion. Rather, it will recognize the necessity for maintaining judicial vigilance over the prosecutorial function to the extent required by due process of law.

CONCLUSION

The judgment of the court of appeals should be affirmed. [16]

Respectfully submitted,

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[16] Because of its conclusion that the Due Process Clause prohibits the respondent's conviction on the felony charge and that that conviction must be reversed, the court of appeals below did not consider the respondent's contention that the evidence was legally insufficient to convict him of that charge. Therefore, should this Court reverse the judgment of the court of appeals, this matter should be remanded for consideration of this remaining issue.

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No. 80-2195

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

LEARLEY REED GOODWIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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I.

In response to our contention that this Court's decisions in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), should not be extended to the pretrial context, respondent argues broadly that those decisions require the use of presumptions of vindictiveness and prophylactic rules throughout all stages of a criminal prosecution. In respondent's view, the "policies" of *Pearce* and *Perry* require that a presumption and prophylactic rule apply "whenever a realistic likelihood of vindictiveness inheres in a given situation" (Br. 9).

a. Little support for respondent's argument can be found in either the holdings or the language of *Pearce* and *Perry*. Not only did both cases concern situations in which the defendant was exposed to more severe punishment after he had had his initial conviction set aside, but the Court carefully described its holdings in terms of due process requirements at the post-conviction stage. *E.g.*, *Pearce*, *supra*, 395 U.S. at 713 ("When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered * * *"); *id.* at 725-726 ("Due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial"); *Perry*, *supra*, 417 U.S. at 28-29 ("* * * it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him"). Moreover, the Court in those cases was confronted with situations in which a vindictive or retaliatory motive was plainly the most likely explanation for the increased penalty exposure, and, indeed, in which no alternative, legitimate explanation was tendered.

Not only has the Court never intimated that presumptions of vindictiveness have any proper role to play in the pretrial context, but it has refused to find due process violations in subsequent cases in which the exercise of a pretrial right has resulted in increased penalty exposure for the defendant—even, in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), where the increase in charges was concededly a retaliatory response to the defendant's refusal to plead guilty. Accordingly, general statements in *Pearce* and *Perry* about burdening procedural rights do not assist respondent here.[1] As Chief

[1] See *Corbitt* v. *New Jersey*, 439 U.S. 212, 218 (1978) ("not every burden on the exercise of a constitutional right, and not every pressure * * * to waive such a right, is invalid"); *Bordenkircher*, *supra*, 434 U.S. at 363 ("the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a

Justice Marshall observed long ago, "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). This concept has particular force in construing the requirements of the Due Process Clause. As this Court noted in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979), "due process is flexible" and depends on "the particular situation." See also *Moyer* v. *Peabody*, 212 U.S. 78, 84 (1909) (Holmes, J.): "due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." For the reasons that we have explained in our opening brief, the circumstances and the necessities of the pretrial context are such that the rules prescribed in *Perry* and *Pearce* should not be applied.

b. Respondent nonetheless contends (Br. 21) that our submission concerning the limits of *Pearce* and *Perry* "is unprecedented in federal case law." This assertion ignores decisions of this Court such as *Corbitt* and *Bordenkircher*, which have emphasized the limits of the rules set forth in *Pearce* and *Perry* and have refused to apply them to government action potentially affecting the exercise of pretrial procedural rights. It is true, of course, that many lower courts have extended *Pearce* and *Perry* far beyond their intended ambit. See our opening brief at 22-23 n.8. Those courts have adopted the view that the assertion by a defendant of nearly any right—under the Constitution, federal statute, or procedural rule—is sufficient to immunize the defendant from modifications of charges at the pretrial stage unless the district court conducts a hearing on the prosecutor's motives at which the prosecutor sustains a weighty burden of persuasion on the issue of good faith. These cases are not persuasive

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defendant might be deterred from the exercise of a legal right, * * * but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction").

authority, however, because none of them even considers or discusses the fundamental question whether, in light of *Bordenkircher* and *Corbitt*, *Pearce* and *Perry* should be extended to the pretrial stage. These courts have simply *assumed* that prophylactic rules intended to keep the "avenues of appellate review of criminal convictions * * * free of unreasoned distinctions" (*Perry*, *supra*, 417 U.S. at 25 n.4) should be extended to increases in charges at the pretrial stage.

The first federal court decision to come to grips with the question whether *Pearce* and *Perry* apply at the pretrial stage is *United States* v. *Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc). In that case, the judges of the court of appeals were deeply divided; the dissenting judges, whose opinions we have quoted in our opening brief, provided cogent reasons for declining to extend *Pearce* and *Perry* to this context. Later, the New Mexico Supreme Court agreed with the dissenting judges in *Andrews* and adopted the analysis that we present here. *State* v. *Stevens*, 633 P.2d 1225 (1981). The most recent decision of a court of appeals to consider this question also concludes that *Pearce* and *Perry* have no application at the pretrial stage. See *United States* v. *Ruppel*, 666 F.2d 261, 266-267 (5th Cir. 1982):

> Ruppel contends that his decision to plead not guilty and stand trial on the counts contained in the initial indictment was the exercise of a procedural right—the right to a trial by jury—and that his due process rights were violated when the Government indicted him for additional crimes arising out of the same transactions upon which the first indictment was based. We disagree with the appellant's reading of *Pearce* and *Blackledge*.
>
> The exercise of "some procedural right" by a defendant during his prosecution—such as electing to stand trial before a jury—is by itself insufficient to place on the prosecutor the burden of demonstrating the absence of vindictiveness in his subsequent acts.

The Fifth Circuit explained that due process violations do not arise from action that discourages the exercise of "some procedural right," but from retaliation against the accused for "lawfully attacking his conviction" (666 F.2d at 266-267). The Fifth Circuit also expressly rejected the reasoning of the court of appeals in the present case (*id.* at 267 n.3):

> We recognize that at least two United States courts of appeals have applied *Pearce* and *Blackledge* to prevent the government from adding additional charges against a federal criminal defendant after he has elected a trial by jury prior to a conviction. See *United States* v. *Goodwin*, 637 F.2d 250 (4th Cir. 1981) * * *; *United States* v. *Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976). We believe, however, that the rationale of the Ninth Circuit in *Ruesga-Martinez* has been substantially undermined by the Supreme Court's decision in *Bordenkircher* v. *Hayes* * * *. We also are of the opinion that the decision of the Fourth Circuit in *Goodwin* may not be squared with the Supreme Court's teachings in *Bordenkircher*. Accordingly, we expressly decline to follow either of these decisions.

c. "Recognizing the interest of the State in efficient criminal procedure" (*Corbitt*, *supra*, 439 U.S. at 220 n.9), this Court has refused to extend concepts of "vindictiveness" in a manner that would seriously interfere with criminal prosecutions in state and federal court. The Court has given great weight to "practical considerations" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 27 n.13 (1973)), and has declined to "interfere" with functions committed to "discretion" in the criminal justice system "in a manner more intrusive than contemplated by *Pearce*" (*id.* at 29 n.15).

Respondent's brief in this Court leaves no room to doubt that the rule that he advocates would clash with these precepts. Respondent asserts that, due to the "volatile nature of the pretrial stage" (Br. 23) and the "ad-

mittedly frequent occurrence" of "confrontation between the defense and prosecution" (*id.* at 24-25) which triggers claims of prosecutorial "vindictiveness," it is essential to conduct a hearing to sift the circumstances and to determine whether a trial on increased charges may proceed. Even a criminal case such as the present one, which in ordinary circumstances could be tried and disposed of in a few days, would be held in abeyance to conduct a far-reaching inquiry into the prosecutor's reasons for increasing charges (Br. 21):

> Relevant to this inquiry are several factors including the nature of the right asserted by the defendant, the prosecutor's knowledge, the nature and timing of the response by the prosecutor, his incentive to discourage the assertion of the defendant's rights, and the institutional interests that may be relevant.

Not content with this catalogue of subjects for judicial inquiry, respondent also urges that, once the prosecutor explains his exercise of prosecutorial discretion, that explanation must be stringently examined to determine the extent to which it rests on recent events, the extent to which the prosecutor's information was available at an earlier time, and the competence or negligence of the prosecutor in failing to act at an earlier time (Br. 32-40). Respondent also observes (Br. 26) that "the assessment of a reasonable likelihood of vindictiveness is not susceptible to bright line analysis, and necessarily rests on the totality of the circumstances in each case." Moreover, in respondent's view, the "mere difficulty of its application does not justify the abandonment of a prophylactic rule * * *" (*ibid.*).

That, we submit, states the proposition in reverse. This Court has never recognized a prophylactic rule of the kind advocated by respondent, and the "difficulty of its application" is a weighty reason for rejecting such a rule. Indeed, it is no exaggeration to observe that, if state and federal courts were required to conduct pre-

liminary trials of the kind suggested by respondent to probe the prosecutor's frame of mind and all of the circumstances of each case, together with "the institutional interests that may be relevant," there would be little time left for trial of such cases on the merits. And prosecutors, faced with the danger of becoming embroiled in such protracted and burdensome proceedings focusing on their discretionary charging decisions, would often feel constrained to press against a defendant, at the very outset, the most severe and numerous criminal charges that could be sustained by the evidence.[2]

d. Respondent's assertion that the presumption of impermissible vindictiveness should be extended to the pretrial stage rests on the premise that prosecutors have a considerable interest in deterring the exercise of pretrial procedural rights (Br. 16-18). Respondent argues (*id.* at 17) that prosecutors have a "personal stake" in assuring that "time and effort" are not needlessly consumed;

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[2] Respondent apparently has no objection to this consequence. In his view, bringing the "most severe charges possible at the outset of the case" is a manifestation of "sound prosecutorial policy" (Br. 25). While that line of argument may be tactically advantageous to respondent in the present posture of this particular case, it is clear that the result that he endorses would be contrary to the interests of criminal defendants as a class. See *Colten* v. *Kentucky*, 407 U.S. 104, 119 (1972). Criminal defendants would suffer serious disadvantages if prosecutors were impelled to bring the most severe charges possible at the outset of every case in order to avoid the danger of later becoming embroiled in a retaliation controversy. U.S. Department of Justice, *Principles of Federal Prosecution* (1980), cited by respondent, does not suggest that prosecutors should behave as respondent proposes. See *id.* at 16-19, stressing the importance of exercising sound prosecutorial discretion in selecting charges that are appropriate for the particular defendant. As that guidebook points out, "it ordinarily should not be necessary to charge a person with every offense for which he may technically be liable * * *. What is important is that the person be charged in such a manner that, if he is convicted, the court may impose an appropriate sentence. The phrase 'all the circumstances of the case' is intended to include any factors that may be relevant to the sentencing decision." *Id.* at 18. See also *id.* at 7-11.

therefore, prosecutors will be inclined to take action that has the purpose and effect of discouraging the exercise of procedural rights that may lead to the unnecessary "expenditure of prosecutorial resources" (*ibid.*). Respondent also states (Br. 18) that "[t]hese costs represent definite institutional interests to which the prosecutor is highly sensitive."

By this reasoning, of course, an increase in charges following the making of almost any contested motion at the pre-trial stage of a criminal case would be sufficient to generate a claim that there is an "appearance of vindictiveness" and to necessitate a hearing. As we have explained in our opening brief (at 24-39), however, there is a fundamental difference between increases in charges that occur at the pretrial stage of a criminal case and increases in charges that occur after a final judgment of conviction. That difference has two dimensions.

First, in contrast to the post-conviction context, a pretrial revision of charges or increase in penalty exposure is more likely to have a legitimate than a "vindictive" motivation. The teaching of common experience, in both civil and criminal litigation, is that pleadings frequently require amendment or modification at the pretrial stage to take account of new information or improved analysis of the facts. Since amended complaints and superseding indictments are commonplace at the pretrial stage, and since diligent attorneys pursue factual research and analysis up until the eve of trial, the explanation for increased charges in most cases is simply that new facts, or a more thorough evaluation of the facts, requires an amendment of the charges.

By contrast, an increase in charges that occurs after the case has been tried—and after all of the facts presumably have been made known to and analyzed by the prosecution and sentencing judge—is an unusual circumstance that may be thought to require an explanation. In *Pearce*, the Court found a presumption of vindictiveness and a prophylactic rule to be required because, in

at least one of the cases before it, "the conclusion [was] inescapable that the State of Alabama is punishing petitioner * * * for his having exercised his post-conviction right of review * * *" (395 U.S. at 726). Similarly, in *Perry*, the prosecutor substantially increased the charges against the accused following the completion of trial and immediately after the filing of a notice of appeal, and tendered no legitimate explanation for that action (417 U.S. at 23). In those post-trial situations, there was a "real threat of vindictiveness" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 28 (1973)). By contrast, the routine modification of charges at the pretrial stage of a criminal prosecution does not reasonably warrant a presumption that the prosecutor is retaliating against the exercise of a procedural right rather than responding to new information concerning the accused.

Second, the exercise of a procedural right at the pretrial stage of a criminal case—even one that is contested by the prosecution—is such a recurring and commonplace event that it is wholly implausible to presume that it would provoke a punitive or retaliatory response. In nearly every criminal prosecution, even those in which a guilty plea is ultimately entered, the accused routinely exercises a wide variety of procedural rights. The prosecutor is far more likely to be astounded by a failure to exercise procedural rights than to be provoked to retaliation by their exercise. Since pretrial exercises of procedural rights are simply "par for the course" (at least outside the context of plea bargaining as in *Bordenkircher*), they are generally not likely to anger the prosecutor. In *Pearce* and *Perry*, by contrast, the defendants' exercise of their rights required the court and prosecutor to "do over" what they thought they "had already done correctly" (*Colten* v. *Kentucky*, 407 U.S. 104, 117 (1972))—a circumstance more likely to prompt a vindictive response.

Finally, even if, in some cases, respondent's speculations about prosecutorial motivation at the pretrial stage were well founded, there still would be no basis for finding a due process violation. Respondent argues that prosecutors may be motivated to obtain increased charges for the purpose, and with the actual effect, of discouraging defendants generally from exercising pretrial rights that impose costs on the criminal justice system. We know of no decision of this Court that suggests that it is improper for a prosecutor to attempt to minimize "the expenditure of prosecutorial resources," to avoid "definite costs * * * in terms of both time and money," or to achieve "savings of resources" through the exercise of charging discretion at the pretrial stage (see Resp. Br. 17-18 & n.9). If criminal charges are supported by the evidence, the prosecutor's consideration of administrative factors of this kind would serve "the interest of the State in efficient criminal procedure" (*Corbitt*, *supra*, 439 U.S. at 220 n.9) and could not be "equated with impermissible punishment" (*id.* at 223).

Indeed, *Corbitt* and *Bordenkircher* stand as a fortiori precedents against respondent's vindictiveness theory. If the severity of punishment may be made to depend on the defendant's willingness to waive the most fundamental of all pretrial procedural rights—the right to insist on a trial—then it is difficult to conceive how encouraging the waiver of other lesser rights, such as the right to be tried in one forum rather than another, could be characterized as improper retaliation.[3] So long as the prosecutor selects charges that are both supported by the evidence and are calculated to increase efficiency in the criminal justice system, his conduct can "not be deemed a needless or arbitrary burden on the defendant's constitutional rights" (*Corbitt*, *supra*, 439 U.S. at 223).

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[3] "There is no question, of course, that a person who is accused of a crime may receive a fair trial before a magistrate or judge." *Ludwig* v. *Massachusetts*, 427 U.S. 618, 627 n.3 (1976).

e. Respondent also argues (Br. 26, 30) that this Court's decisions in *Bordenkircher* and *Corbitt* are irrelevant here because they involved "plea bargaining." In respondent's view, those cases set forth special rules for plea bargaining, a context in which "prosecutorial vindictiveness has been condoned."

We readily concede that this case differs from *Bordenkircher*. There the increased charges were obtained for the express purpose of responding to the defendant's refusal to plead guilty to the original charges; nevertheless, because the Court found that the prosecutor's effort to secure a guilty plea served "legitimate" state interests in conserving prosecutorial and judicial resources (434 U.S. at 364), it concluded that the increased charges were not impermissibly vindictive in violation of the defendant's due process rights. In the instant case, by contrast, respondent was never threatened in any way with regard to the exercise of his jury trial rights, and there is no suggestion that the increased charges were in any way a response to, let alone an effort to retaliate against, his exercise of that right.[4] It would be ironic indeed if a

[4] Respondent's effort to distinguish *Bordenkircher* also rests on a mischaracterization of the facts in the present case. Plea negotiations did in fact take place in this case (J.A. 26), and the charges against respondent were increased after plea negotiations failed. In that respect this case is comparable to *Bordenkircher*. Although it is true that respondent was not explicitly "threatened" with increased charges by the original prosecutor, respondent necessarily assumed the risk that further processing of his case would lead to an alteration of charges. When a plea offer is rejected, the defendant runs the risk that a reevaluation of charges will take place in light of additional factual investigation, and that the sentencing court will impose the maximum penalty provided by law in the event of a conviction. The Constitution "does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision." *Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 226. Respondent received no assurance of any kind that, after he insisted that his case be transferred to the district court for trial by jury, the successor prosecutor would not supplement the factual investigation of his inexperienced predecessor.

rule designed to protect defendants against retaliatory responses were held applicable, as respondent suggests, precisely because there is no showing of a responsive reaction to the exercise of a right.

While respondent's proposed distinction of *Bordenkircher* is topsy-turvy logic, it is no distinction at all in comparing this case to *Corbitt*, where this Court extended the principle of *Bordenkircher* beyond the plea bargaining context. In *Corbitt* the Court approved a statutory scheme that authorized the sentencing court to impose different penalties on criminal defendants depending on whether they elected to stand trial or pleaded non vult. The Court premised this holding on the state's "legitimate interest" (439 U.S. at 222) in obtaining a waiver of constitutional rights as part of the process of promoting an efficient criminal justice system. To the extent that the state imposed differential penalties to obtain these "substantial benefits," its action could not be characterized as "needless or arbitrary" (*id.* at 223). Contrary to respondent's contention, the Court reached this conclusion in *Corbitt* without reliance on the existence of plea bargaining in the particular case before it. See *id.* at 221 n.10 ("escalation of the charges after the failure of plea bargaining * * * is not present here; and we need not rely on this aspect of the *Bordenkircher* decision"). See also *id.* at 227 (Stewart, J., concurring) ("It seems to me that there is a vast difference between the settlement of litigation through negotiation between counsel for the parties, and a state statute such as is involved in the present case"); *id.* at 231 (Stevens, J., dissenting) ("Nor is this statutory scheme the equivalent of a plea bargain negotiated between defense counsel and the prosecutor").

In short, even if this Court were to accept respondent's submission that pretrial charging decisions frequently have the purpose and effect of limiting "expenditure of prosecutorial resources" by deterring other defendants from exercising similar rights (Br. 17), there

still would be no basis for adopting a presumption of improper "vindictiveness" at the pretrial stage. So long as the defendant is not "subjected to unwarranted charges" (*Corbitt, supra*, 439 U.S. at 223), government action aimed at the conservation of scarce resources in the criminal justice system is not "vindictive" or malicious in nature. This is true regardless of the scope of plea bargaining that takes place in a particular case, as *Corbitt* clearly establishes.

II.

We have maintained in our opening brief (at 39-43) that, even if this Court were to disagree with our submission that a presumption of impermissible vindictiveness should never apply at the pretrial stage, such a presumption should be employed only in those circumstances in which improper retaliation appears to be the likeliest explanation for revised charges. We argued that there is no genuine danger of vindictiveness on the facts of this record that would justify the adoption of a presumption of vindictiveness. In support of that submission, we pointed out that respondent has never alleged the existence of actual vindictiveness, and the court of appeals explicitly found that "the prosecutor did not act with actual vindictiveness in seeking a felony indictment" (Pet. App. 4a). The original charges were preferred by a police officer and initially handled by a temporary prosecutor with limited authority. Neither of the prosecutors who participated in this case ever threatened respondent with an increase in charges or took other action to discourage him from exercising his right to trial by jury rather than by magistrate, and there is not the slightest indication that either prosecutor regarded his request as anything other than a routine exercise of a procedural right. Moreover, the increase in charges did not supervene immediately upon the request for a jury trial. To the contrary, charges were increased approximately six weeks after respondent requested a trial by jury (Pet.

App. 19a). Finally, the record reveals no reason why the successor prosecutor would regard this case as being different from the many other cases assigned to him in which defendants requested a trial by jury. See *Colten* v. *Kentucky, supra*, 407 U.S. at 117.

In answer to our submission, respondent asserts (Br. 20) that the increased charges here are "appropriately suspect" because the successor prosecutor "substituted" more serious charges based on the same conduct underlying the original charges. He claims that there is a "crucial distinction" between "the addition of charges as contrasted with the substitution of charges" (*id.* at 19), and that even though a presumption of vindictiveness need not arise when charges are added, it should when they are substituted (*id.* at 20). Respondent buttresses his argument by attacking the performance of the original prosecutor. In respondent's view, she followed "improper prosecutorial procedure" when she failed to obtain increased charges at the outset, and thus was guilty of "exceedingly poor performance of the prosecutorial function" (*id.* at 26). Respondent characterizes the original prosecutor's failure to obtain increased charges against him before he demanded a trial by jury as a "grossly inadequate" and "ill advised" performance of duty (*id.* at 39, 40).

In determining whether there is a realistic likelihood of vindictiveness, however, it is of little consequence whether the prosecutor's action entails the addition of more numerous charges or the substitution of more severe charges. Both charging techniques have an equal capacity to "up the ante." Whether one technique is used rather than the other sheds no light on the prosecutor's frame of mind or the justifications for his conduct. As the facts of this case show, receipt by the prosecutor of additional information, and further evaluation of that information, may warrant the conclusion that a more severe charge should be substituted for a lesser charge. Likewise, continuing factual evaluation can lead to the

conclusion that the addition of charges for other related crimes is appropriate. As Judge Keith correctly observed in his panel dissent in *United States* v. *Andrews*, 612 F.2d 235, 256 (6th Cir. 1979), the distinction between added and substituted charges is "tenuous." Whether the prosecutor "substituted or added the charge is not very important." *Ibid.*

Moreover, respondent's repeated protestations that the original prosecutor acted negligently in failing to prefer increased charges against him before he demanded a trial by jury serves only to highlight the weakness of his claim that there is a genuine likelihood of vindictiveness in this setting. If, as respondent concedes, he should have been charged more severely at the outset, and if it was a "grossly inadequate" performance of duty to fail to do so, then it is quite clear that the successor prosecutor's decision to increase the charges against respondent was a diligent performance of duty intended to correct a serious mistake. Respondent's acknowledgment that he should have been charged with a felony from the outset is in itself sufficient to rebut the suggestion that the increase in charges here at issue was the product of malicious or vindictive motivation.[5]

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[5] Respondent argues (Br. 7, 19), without supporting authority, that the prosecutor's interest in substituting more severe charges here is "diminished" because a decision originally was made to charge him with a misdemeanor. However, police officers and prosecutors are human beings, not infallible high-speed computers, and it is inevitable that errors will sometimes be made in the initial charging decision. As respondent has conceded, the lenient charges originally lodged by Officer Morrissette were wholly inappropriate in light of his conduct and prior criminal record. The government plainly has a substantial interest in correcting erroneous charging decisions of this kind. "To hold otherwise would unduly restrict the prosecuting attorney from making an independent examination of the criminal conduct and substituting his formulation of the appropriate charges in place of the lay person's." *United States* v. *Sturgill*, 563 F.2d 307, 309-310 n.3 (6th Cir. 1977).

III.

We also have contended (Br. 44-48) that, even if the Court disagrees with our primary submission and concludes that some explanation was required by the prosecutor to justify increased charges in this case, the prosecutor completely dispelled any appearance of vindictiveness that might be thought to arise on this record by his demonstration of objective facts justifying the procurement of a felony indictment. Respondent's answer to our assertion is not that the prosecutor lacked good faith, objective grounds for increasing the charges. To the contrary, respondent agrees that the original charges were too lenient, that the original prosecutor should have taken steps to increase them, and that the successor prosecutor corrected an "exeedingly poor performance of the prosecutorial function" when he obtained enhanced charges (Br. 25-26, 39-40). Respondent's objection to the prosecutor's explanation is that it did not satisfy two arbitrarily selected standards. In respondent's view, the prosecutor was required to show that the increased charges rest on "conduct on the part of the respondent occurring subsequent to the exercise of his right to a jury trial" (Br. 32). Alternatively, respondent claims that the prosecutor failed to explain adequately why the government did not obtain enhanced charges before he exercised his procedural right (Br. 37-39).

In making these arguments, respondent completely misconceives the issue before the Court. The question is not whether the government based its charging decision on recent events, or whether the government satisfied some undefined standard of dispatch in marshalling and analyzing the facts. The question is whether the prosecutor explained his conduct in a manner that demonstrated that he had in mind legitimate considerations, rather than irrational or vindictive ones, when he obtained increased charges. As discussed in our opening brief (at 46-48), the uncontradicted evidence offered by the prosecutor in

this case clearly shows that he acted on the basis of proper considerations.

a. Respondent's initial argument (Br. 32-37) is that, after a criminal defendant exercises a procedural right at the outset of a criminal prosecution, the government may base increased charges only on events that occur subsequent to that time. On this theory, a quick demand for a trial by jury would be sufficient to ensure that the government is disabled from "upping the ante" based on its continuing investigation of the facts surrounding the crime and the defendant's background. No matter how deficient the government's initial understanding of the relevant facts might be, the assertion of some procedural right would be enough to confer this immunity. No decision of this Court has ever suggested that the exercise of a procedural right at the outset of a criminal prosecution should bar the government from modifying charges in light of continuing investigation and analysis of the facts.[6] Moreover, the better reasoned decisions of the lower courts repeatedly have held that a charge that is too lenient may be corrected in light of further investigation of the facts or an apparent oversight on the part of the original prosecutor (see our opening Brief at 45).

b. Respondent also argues (Br. 37-41) that the government is estopped to correct the unduly lenient charges against him because the government could have obtained increased charges before he demanded a trial by jury. However, this Court has never indicated that the prosecution must assemble and fully analyze all relevant information prior to some arbitrarily defined cut-off point, or that it is barred from continuing to evaluate the facts

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[6] Whatever the merits of applying such a rule to the sentencing decision of a trial judge following an appeal and retrial (*North Carolina* v. *Pearce*, *supra*, 395 U.S. at 741 (Black, J., concurring in part and dissenting in part); *id.* at 751 (White, J., concurring in part)), there is no basis for so restricting the discretion of the prosecutor at the preliminary stage of the proceeding when the need for flexibility in adjusting charges is paramount.

after a criminal defendant exercises a pretrial right. Moreover, it is perfectly understandable in the present case why the government did not obtain enhanced charges until it did.

Although respondent suggests that all of the pertinent information was "available" to the government (Br. 9) prior to the time that he exercised his procedural right, and that the "prosecution" was aware of all material information from the beginning (Br. 37-39), the record clearly shows that the relevant facts were not fully gathered and analyzed until the successor prosecutor (AUSA Norton) was assigned to the case and commenced trial preparation. There is no dispute that the original charges were filed by a police officer who had no power to obtain a felony indictment. Shortly after those charges were lodged against respondent, he fled the jurisdiction and remained absent for three years. When he finally was located in jail in Virginia and returned to Maryland for trial, an attorney temporarily assigned to the magistrate's court handled his case.[7] Her knowledge of the case was limited to the facts underlying the incident on the parkway and respondent's failure to appear for trial in 1976 (J.A. 25-26). Respondent's extensive involvement in importing and selling heroin, and his commission of perjury, were not known to the original prosecutor. As the successor prosecutor later explained to the district court (Nov. 7, 1979 Tr. 200):

> As [these facts] relate[] to Mrs. Bruce's knowledge on May 24th of that date, I suppose * * * she could

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[7] It is undisputed that the original prosecutor (an attorney from the Antitrust Division of the Department of Justice) was assigned for a two-week period to try only petty crime and misdemeanor cases in the magistrate's court. She could not obtain a felony indictment. See J.A. 25-26; Nov. 7, 1979 Tr. 196-197 ("She has absolutely no authority to file informations or to request that indictments be sought whatsoever. Her sole function is to be there in court and to prosecute the cases that are filed by law enforcement officers.").

> have found out all that information. As a matter of fact, she did not.

See also Nov. 7, 1979 Tr. 197 ("she did not know that Mr. Goodwin had committed perjury"); see also *id.* at 202-204.

In sum, all of the information relevant to the prosecutor's decision to increase charges was not gathered and analyzed until several weeks after respondent exercised his right to stand trial (Pet. App. 22a-23a, 27a-31a). It should be immaterial that the information might have been gathered and analyzed at an earlier time. As the district court explained (Pet. App. 23a): "the case law does not imply, and the due process clause does not require, that the prosecutor carry such a heavy burden of acquiring all information which is potentially available to him at a given time."

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

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